

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~18~~ 1810.

No. ~~18~~ 75.

**FORE RIVER SHIPBUILDING COMPANY, PLAINTIFF IN
ERROR,**

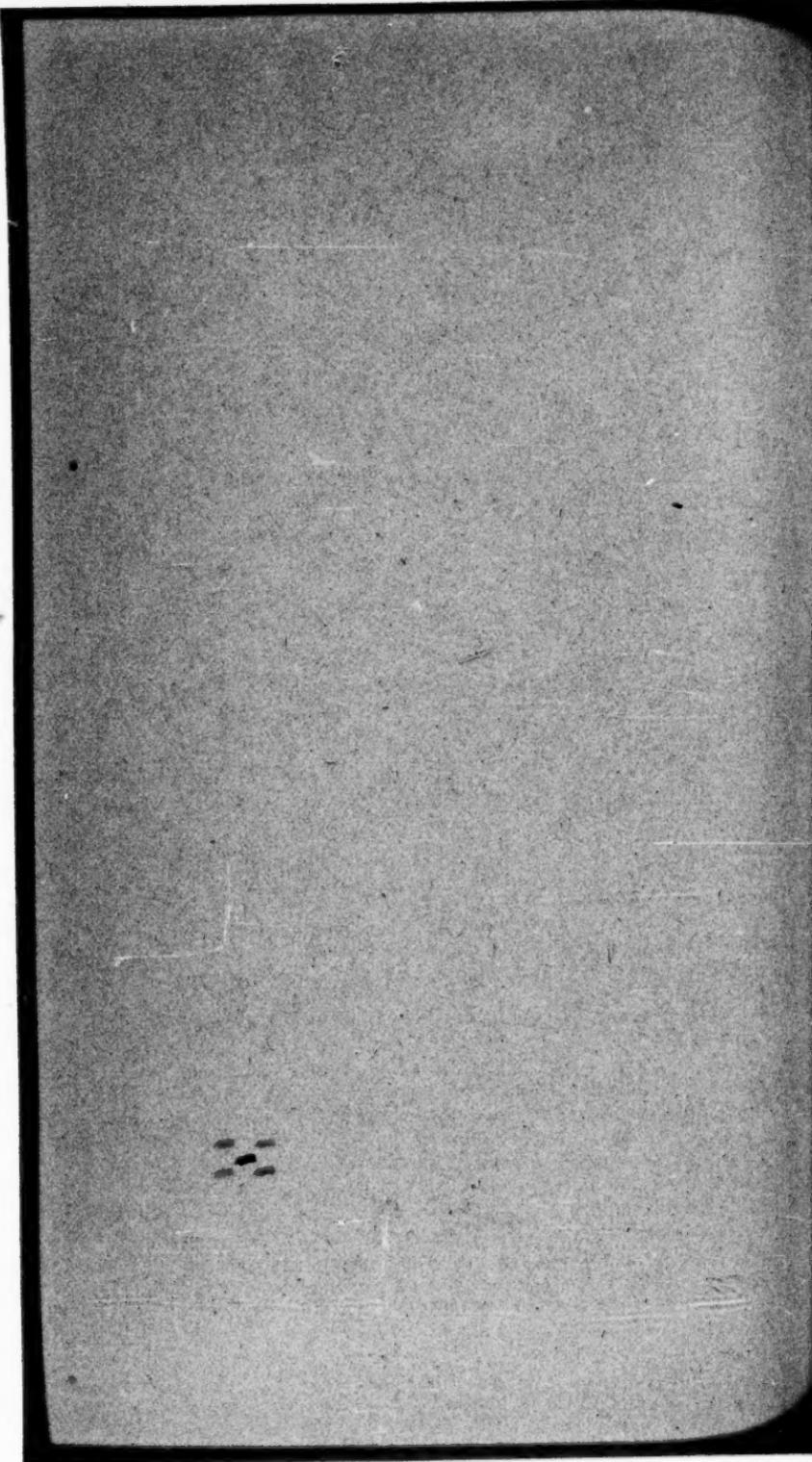
vs.

SELMA T. HAGG.

**IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.**

FILED OCTOBER 2, 1800.

(21,350)



(21,350)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 262.

FORE RIVER SHIPBUILDING COMPANY, PLAINTIFF IN
ERROR,

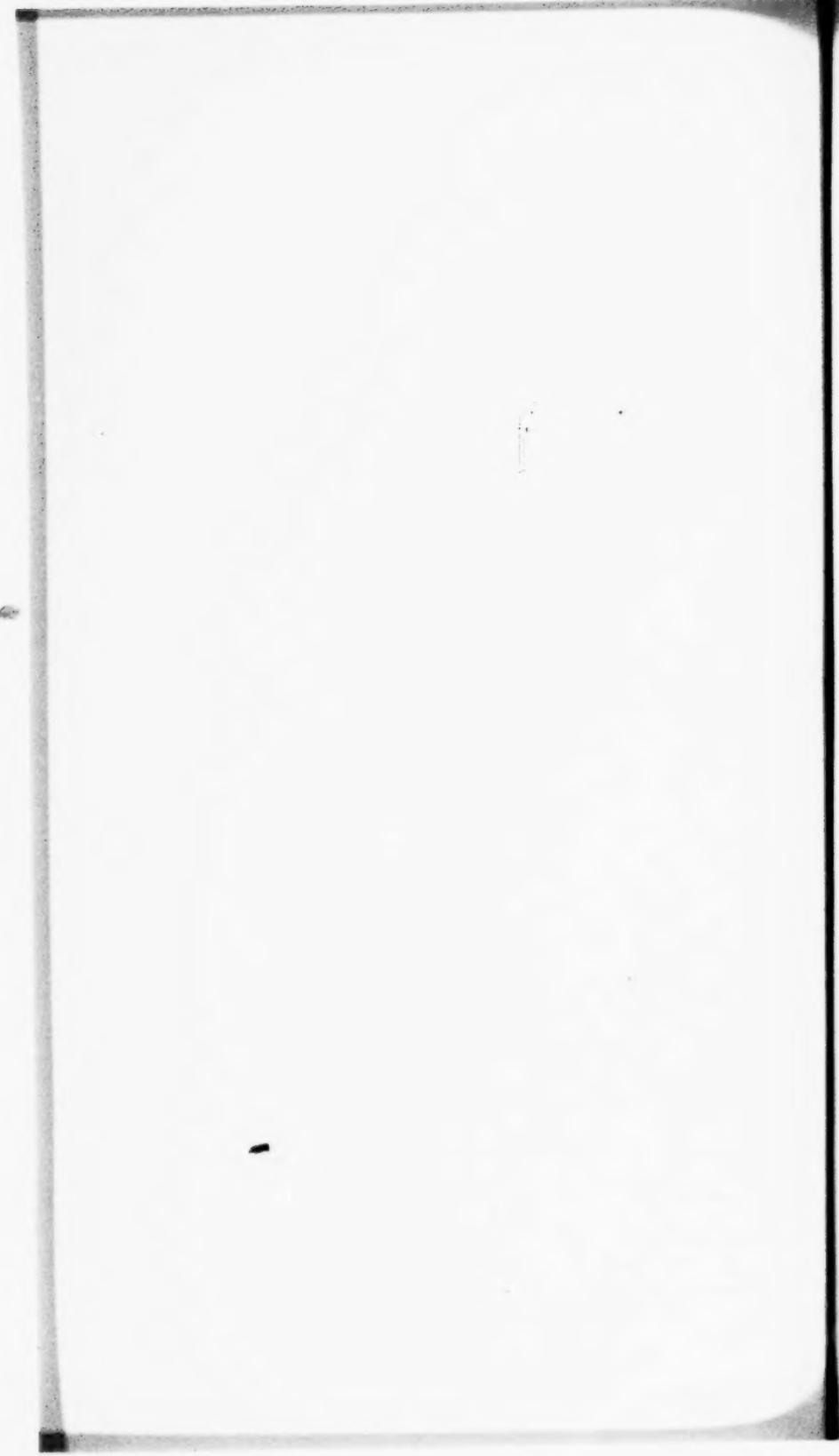
vs.

SELMA T. HAGG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

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a Circuit Court of the United States, District of Massachusetts.

No. 313. Law Docket.

SELMA T. HAGG, Plaintiff,

v.

FORE RIVER SHIPBUILDING COMPANY, Defendant.

Writ of Error and Return of Circuit Court Thereon.

1 Writ of Error.

[Seal of the Circuit Court, Massachusetts.]

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Selma T. Hagg, a citizen of a foreign jurisdiction, to wit, the Kingdom of Sweden, commorant in Quincy, Massachusetts, as she is the widow of Charles A. Hagg, deceased, intestate, who was in his lifetime also a citizen of said Kingdom of Sweden, Plaintiff, and the Fore River Shipbuilding Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having a usual place of business at Quincy, in the District of Massachusetts, Defendant, a manifest error hath happened, to the great damage of the said Defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the* fifteenth day of October next, in the said Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of September, in the year of our Lord one thousand nine hundred and eight.

ALEX. H. TROWBRIDGE,

*Clerk of the Circuit Court of the United States,
District of Massachusetts.*

*Not exceeding 30 days from the day of signing the citation.
Rule 14, Sec. 5.

Allowed Sept. 16, 1908, by

FREDERIC DODGE,
U. S. District Judge.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judges of the Circuit Court of the United States in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I Alex. H. Trowbridge, Clerk of said Circuit Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this first day of October A. D. 1908.

[Seal of the Circuit Court, Massachusetts.]

ALEX. H. TROWBRIDGE, *Clerk.*

Transcript of Record of Circuit Court.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, Begun and Holden at Boston, within and for the District of Massachusetts on the Last Tuesday of February, Being the Twenty-fifth Day of February, in the Year of our Lord One Thousand Nine Hundred and Eight.

Before Frederic Dodge, District Judge.

No. 313. Law Docket.

SELMA T. HAGG, Plaintiff,

v.

FORE RIVER SHIPBUILDING COMPANY, Defendant.

The Writ and Declaration in this cause were filed in the clerk's office on the second day of August, A. D. 1907, and are in the words and figures following:

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

4 We command you to attach the goods or estate of Fore River Shipbuilding Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having a usual place of business at Quincy in our District of Massachusetts, to the value of ten thousand dollars, and to summon the said defendant (if it may be found in your District) to appear before our Judges of our Circuit Court of said United States for the First Circuit, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of October next, then and there in our said Court to answer unto Selma T. Hagg, a citizen of a foreign jurisdiction, to wit, the Kingdom of Sweden, commorant in said Quincy as she is the widow of Charles A. Hagg, deceased, intestate, who was in his lifetime also a citizen of said Kingdom of Sweden. In an action of tort; to the damage of the said plaintiff as she says the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ with your doings therein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at Boston, the thirtieth day of July in the year of our Lord one thousand nine hundred and seven.

ALEX. H. TROWBRIDGE, Clerk,
By L. C. TUCKER, Deputy Clerk.

Officer's Return on Writ.

BOSTON, August 1st, 1907.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

5 Pursuant hereunto I have this day attached a chip as the property of the within-named "Fore River Shipbuilding Company" corporation and afterwards on the same day summoned it to appear and answer at Court as within commanded by delivering to J. A. Sedgwick, Treasurer thereof, in hand at Quincy in said District, an original summons of this writ.

CHARLES A. BANCROFT,
Deputy U. S. Marshal.

Fees.

Service	\$2.00
Expense80
	<hr/>
	\$2.80

Plaintiff's Declaration.

(Filed August 2, 1907.)

First Count. And the plaintiff says that she is a citizen of the Kingdom of Sweden, commorant in Quincy in the District of Massachusetts, and that she is the widow of Charles A. Hagg, deceased, who was at the time of his death a citizen of the Kingdom of Sweden; that said Charles A. Hagg on the eleventh day of June, 1907, was employed by the defendant company in its ship-building plant in that part of Quincy known as Quincy Point; that in the forge shop of said plant there was a furnace in which on said day a hollow shaft closed at both ends by plugs or other obstructions was being melted or heated.

And the plaintiff says that said Charles A. Hagg while in the employ of the defendant as aforesaid, and in the exercise of due care, was instantly killed or received injuries which caused his death without conscious suffering, by reason of the negligence of 6 a person in the service of the defendant who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of said defendant company, which negligence consisted in allowing said hollow shaft to become filled or partially filled with water, and not discovering or taking pains to discover the same, and in causing said shaft while in such condition to be heated without previously removing said plugs or other obstructions, or otherwise providing a safe and sufficient means of escape for the steam, and expanding air and gases within, in consequence whereof, said plug or other obstruction in one end of said shaft was blown off with great force, injuring and causing the death of said Charles A. Hagg, as aforesaid.

Second Count. And the plaintiff says that she is a citizen of the Kingdom of Sweden, commorant in Quincy in the District of Massachusetts, and that she is the widow of Charles A. Hagg, deceased, who was at the time of his death a citizen of the Kingdom of Sweden; that said Charles A. Hagg on the eleventh day of June, 1907, was employed by the defendant company in its shipbuilding plant in that part of Quincy known as Quincy Point; that in the forge shop of said plant there was a furnace in which on said day a hollow shaft closed at both ends by plugs or other obstructions was being melted or heated.

And the plaintiff says that said Charles A. Hagg while in the employ of the defendant as aforesaid, and in the exercise of due care, was instantly killed or received injuries which caused his death without conscious suffering, by reason of the negligence of 7 a person in the service of the defendant who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of said defendant company, which negligence

consisted in allowing said hollow shaft while filled with air and other gases to be heated and said air or gas to be thereby expanded, without previously removing said plug or other obstruction or otherwise providing a safe and sufficient means of escape for the expanding air and gases within, in consequence whereof, said plug or other obstruction in one end of said shaft was blown off with great force, injuring and causing the death of said Charles A. Hagg, as aforesaid.

Third Count. And the plaintiff says that she is a citizen of the Kingdom of Sweden, commorant in Quincy in the District of Massachusetts, and that she is the widow of Charles A. Hagg, deceased, who was at the time of his death a citizen of the Kingdom of Sweden; that said Charles A. Hagg on the eleventh day of June, 1907, was employed by the defendant company in its ship-building plant in that part of Quincy known as Quincy Point; that in the forge shop of said plant there was a furnace in which on said day a hollow shaft closed at both ends by plugs or other obstructions was being melted or heated.

And the plaintiff says that said Charles A. Hagg while in the employ of the defendant as aforesaid, and in the exercise of due care was instantly killed or received injuries which caused his death without conscious suffering, by reason of the negligence of a person in the service of the defendant who was entrusted

8 with and was exercising superintendence and whose sole or

principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of said defendant company, which negligence consisted in failing to have said shaft put into a safe and suitable condition to be heated, and in allowing it to be heated while in a defective and dangerous condition, in consequence whereof, the plug or other obstacle in one end was blown off, also in directing and allowing said Hagg to work upon and near said shaft while it was in a dangerous condition without giving him proper warning, in consequence whereof, he was injured and killed by the blowing off of said plug, as aforesaid.

Fourth Count. And the plaintiff says that she is a citizen of the Kingdom of Sweden, commorant in Quincy in the District of Massachusetts, and that she is the widow of Charles A. Hagg, deceased, who was at the time of his death a citizen of the Kingdom of Sweden; that said Charles A. Hagg on the eleventh day of June, 1907, was employed by the defendant company in its ship-building plant in that part of Quincy known as Quincy Point; that in the forge shop of said plant there was a furnace in which on said day a hollow shaft closed at both ends by plugs or other obstructions was being melted or heated.

And the plaintiff says that Charles A. Hagg while in the employ of the defendant, as aforesaid, and in the exercise of due care was instantly killed or received injuries which caused his death without conscious suffering, through a defect in the condition of the

9 ways, works and machinery, connected with, and used in the business of the said defendant, which arose from, and had not been discovered or remedied in consequence of, the

negligence of the defendant or of some person in the service of said defendant who had been entrusted by it with the duty of seeing that the ways, works and machinery were in proper condition, more particularly in that the said hollow shaft was in so defective a condition that the heating of said shaft caused the plug or other obstacle in one end to be blown off with great force, injuring and causing the death of said Hagg, as aforesaid.

All of said counts are for one and the same cause of action. Due notice of the time, place, and cause of said injury was given to the defendant company.

By Her Attorneys, ASA P. FRENCH,
GEORGE F. ADAMS.
JAMES S. ALLEN, JR.

Upon the filing of the writ and declaration an order to plead was entered.

On the third day of September, A. D. 1907, the following Motion to Dismiss was filed by defendant.

Motion to Dismiss.

(Filed Sept. 3, 1907.)

And now comes the defendant in the above entitled cause and moves that the plaintiff's writ may be dismissed on the ground that the Circuit Court of the United States has no jurisdiction 10 thereof as the suit being brought under a Massachusetts Statute penal in character, it cannot be enforced in the United States Courts.

By Its Attorneys, JOHN LOWELL.
JAMES A. LOWELL.

On the sixth day of September, A. D. 1907, the following Plaintiff's Motion to Dismiss Defendant's Motion to Dismiss and for a Default was filed.

Plaintiff's Motion to Dismiss Defendant's Motion to Dismiss and for a Default.

(Filed Sept. 6, 1907.)

And now comes the plaintiff in the above entitled cause and moves that the defendant's motion to dismiss be dismissed with costs upon the ground that it is without foundation in law and is designed to prevent a speedy trial of said cause; and further that the defendant be defaulted for failure to answer the plaintiff's declaration in accordance with the order of the Court.

By Her Attorneys, ASA P. FRENCH.
GEORGE E. ADAMS.
JAMES S. ALLEN, JR.

On the twenty third day of September, A. D. 1907, this cause came on to be heard on plaintiff's motion to dismiss defendant's motion to dismiss and on defendant's motion to dismiss and was fully heard by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting, and on the twenty seventh day of September, A. D. 1907, it was ordered by the Court that the defendant's motion to dismiss be denied and that defendant answer on or before October 4, 1907.

On the first day of October, A. D. 1907, the following Answer was filed:

11

Answer.

(Filed Oct. 1, 1907.)

And now comes the defendant in the above entitled cause, and for answer to the plaintiff's writ and declaration and every count and item thereof denies each and every allegation therein contained.

By Its Attorney, JOHN LOWELL.

On the second day of October, A. D. 1907, the following Defendant's Bill of Exceptions *in re Motion to Dismiss* was filed:

Defendant's Bill of Exceptions in re Motion to Dismiss.

(Filed Oct. 2, 1907.)

This was an action of tort brought by Selma T. Hagg, a widow, to recover for the death of her husband. This action was brought under the provisions of the Revised Laws of Massachusetts, Chap. 106, Sec. 73. The defendant filed the following motion to dismiss:

"And now comes the defendant in the above entitled cause and moves that the plaintiff's writ may be dismissed on the ground that the Circuit Court of the United States has no jurisdiction thereof as the suit being brought under a Massachusetts statute penal in character, it cannot be enforced in the United States Courts.

By Its Attorneys, JOHN LOWELL.
JAMES A. LOWELL."

After a hearing on this motion the judge overruled the motion. The defendant, being aggrieved by the aforesaid ruling excepts thereto and prays that its exceptions may be allowed.

By Its Attorneys, JOHN LOWELL.
JAMES A. LOWELL.

Oct. 3, 1907.

Allowed:

F. C. LOWELL,
U. S. Circuit Judge.

12 On the third day of October, A. D. 1907, the foregoing Defendant's Bill of Exceptions was allowed by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting as aforesaid.

This cause was thence continued from term to term to the present February Term, A. D. 1908, when, to wit, March 12, 1908, the following Plaintiff's Motion to Amend Declaration and Amendment is filed by consent:

Plaintiff's Motion to Amend Declaration and Amendment.

(Filed by Consent March 12, 1908.)

And now comes the plaintiff in the above entitled action and moves to amend her declaration heretofore filed therein, by adding thereto the following:—

Fifth Count. And the plaintiff says that she is a citizen of the Kingdom of Sweden commorant in Quincy in the District of Massachusetts, and that she is the widow of Charles A. Hagg, deceased, who was at the time of his death a citizen of the Kingdom of Sweden; that said Charles A. Hagg on the eleventh day of June, 1907, was employed by the defendant company in its shipbuilding plant in said Quincy; that while so employed and in the exercise of due care, said Charles A. Hagg was instantly killed, or received injuries which caused his death without conscious suffering, on said eleventh day of June, 1907, by reason of the negligence of a person in the service of the defendant who was entrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or in the absence of such superintendent, of a person acting as superintendent with the authority or consent of said defendant company.

By Her Attorney, ASA P. FRENCH.

13 On the same day, issue being joined, a jury is duly empanelled and sworn according to law to try the issue, the Honorable Frederic Dodge, District Judge, sitting.

On the eighteenth day of March, A. D. 1908, this cause is committed to the jury, who, after hearing all matters and things concerning the same, return the following Verdict:

Verdict.

March 18, 1908.

The jury find for the plaintiff, and assess damages in the sum of five thousand dollars.

JOHN L. LITCHFIELD, *Foreman.*

On the nineteenth day of March, A. D. 1908, the following Defendant's Motion for New Trial is filed:

Defendant's Motion for New Trial.

(Filed March 19, 1908.)

And now comes the defendant in the above entitled cause and moves for a new trial on the grounds that the verdict was against the evidence, the weight of the evidence, and, as the damages were to be awarded with reference to the degree of culpability, there was not sufficient evidence to warrant a verdict for \$5,000, the full amount authorized by the Statute.

By Its Attorney, JOHN LOWELL.

On the eleventh day of April, A. D. 1908, this cause comes on to be heard on the defendant's motion for new trial and is fully heard by the Court, the Honorable Frederic Dodge, District Judge, sitting, and said motion is denied by the Court.

On the same day, a Defendant's Bill of Exceptions is filed and presented to the Court under Rule 17.

14 On the seventeenth day of April, A. D. 1908, a Substituted Bill of Exceptions is filed and presented to the Court.

On the thirtieth day of June, A. D. 1908, the following Certificate of Judge,—certifying question of jurisdiction, in re motion to dismiss, to U. S. Supreme Court,—is filed:

Certificate of Judge.

(Filed June 30, 1908.)

Now therefore the Court hereby certifies to the Supreme Court of the United States the question of jurisdiction which has arisen upon the aforesaid motion to dismiss and the overruling of said motion, to wit: whether or not the Statute under which the plaintiff's action was brought was of such a penal character that the Circuit Court did not have jurisdiction of said action.

FRANCIS C. LOWELL,
U. S. Circuit Judge.

On the ninth day of September, A. D. 1908, the Defendant's Substituted Bill of Exceptions, filed April 17, 1908, is waived pursuant to agreement of counsel, and the following Judgment is entered:

Judgment.

Sept. 9, 1908.

And now, to wit, September 9, 1908, it is considered by the Court, the Honorable Frederic Dodge, District Judge for the District of Massachusetts, sitting, that the said Selma T. Hagg, plaintiff, recover of the said Fore River Shipbuilding Company, defend-

ant, the sum of five thousand one hundred forty two dollars and fifty cents (\$5142.50) damages, and her costs of suit taxed at —.

A true record:

Attest:

ALEX. H. TROWBRIDGE, Clerk.

15 *Petition for Writ of Error and Assignment of Errors.*

(Filed Sept. 16, 1908.)

Petition for Writ of Error.

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

And now comes the Fore River Shipbuilding Company, the defendant herein, and says that on or about the ninth day of September, A. D. 1908, this Court entered judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this defendant, all of which will more in detail appear in the assignment of errors which is filed with this petition.

Wherefore the defendant prays that a writ of error may issue in its behalf to the United States Supreme Court for the corrections of errors so complained of and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the United States Supreme Court.

Assignment of Errors.

The defendant in this action in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred upon the trial of this case, to wit:

The Court erred in overruling the defendant's motion to dismiss

FORE RIVER SHIPBUILDING
COMPANY.

By Its Attorneys, LOWELL & LOWELL.

(Filed and Approved Sept. 16, 1908.)

Know all men by these presents, That We, the Fore River Shipbuilding Company, as principal, and National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having a usual place of business in the City of Boston, are held and firmly bound unto Selma T. Hagg, a citizen of a foreign jurisdiction, to wit, the Kingdom of Sweden, commorant in said Quincy as she is the widow of Charles A. Hagg, deceased, intestate, who was in his lifetime also a citizen of said Sweden, in

the full and just sum of \$7500 (seventy five hundred dollars), to be paid to the said Selma T. Hagg, her certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated the ninth day of September, in the year of our Lord one thousand nine hundred and eight.

Whereas lately at a Circuit Court of — United States for the District of Massachusetts, in a suit depending in said Court between said Selma T. Hagg, plaintiff, and the Fore River Shipbuilding Company, defendant, judgment was rendered against the said Fore River Shipbuilding Company for five thousand dollars (\$5000.00) and the said Fore River Shipbuilding Company, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Selma T. Hagg, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next:

17 Now the condition of the above obligation is such, that if the said Fore River Shipbuilding Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

FORE RIVER SHIPBUILDING CO. [SEAL.]

A. T. BOWERS, President.

NATIONAL SURETY COMPANY. [SEAL.]

By GUSTAVUS C. HOLT, Attorney-in-fact.

Signed, sealed and delivered in presence of

SAMUEL T. MACQUARRIE,

To F. R. S. Co.

JAS. W. MITCHELL,

To N. S. Co.

Approved:

ASA P. FRENCH,

Plaintiff's Attorney.

September 16, 1908.

Approved:

FREDERIC DODGE,

U. S. District Judge, Acting as Circuit Judge.

UNITED STATES OF AMERICA, sa:

The President of the United States to Selma T. Hagg, a citizen of a foreign jurisdiction, to wit, the Kingdom of Sweden, commorant in Quincy, Massachusetts, as she is the widow of Charles A. Hagg, deceased, intestate, who was in his lifetime also a citizen of said Kingdom of Sweden, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, Washington, D. C., on the* fif-

12 FORE RIVER SHIPBUILDING COMPANY VS. SELMA T. HAGG.

teenth day of October next, pursuant to a Writ of Error filed in the Clerk's Office of the^t Circuit Court of the United States for the District of Massachusetts, wherein the Fore River Shipbuilding Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having a usual place of business at Quincy, in the District of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts, this sixteenth day of September, in the year of our Lord one thousand nine hundred and eight.

FREDERIC DODGE,
U. S. District Judge.

*Not exceeding 30 days from the day of signing.

†Name of Court to which Writ of Error is directed.

19 Acknowledgment of Service on Citation on Writ of Error.

BOSTON, MASS., September 18, 1908.

We hereby accept service of the within writ on behalf of the defendant in error named within.

ASA P. FRENCH,
JAMES S. ALLEN, JR.,
Attorneys.

20

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled, No. 313, Law Docket, Selma T. Hagg, Plaintiff, v. Fore River Shipbuilding Company, Defendant, in said Circuit Court determined, the Petition for Writ of Error and Assignment of Errors, the Bond on Writ of Error, and also the original Citation upon the Writ of Error issued in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this first day of October, A. D. 1908.

[Seal of the Circuit Court, Massachusetts.]

ALEX. H. TROWBRIDGE, *Clerk.*

Endorsed on cover: File No. 21,350. Massachusetts C. C. U. S. Term No. 232. Fore River Shipbuilding Company, plaintiff in error, vs. Selma T. Hagg. Filed October 2d, 1908. File No. 21,350.

Supreme Court of the United States

October Term, 1910

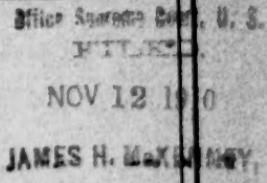
No. 75

Fore River Shipbuilding Company

PLAINTIFF IN ERROR

v.

Selma T. Hagg.



IN ERROR TO THE CIRCUIT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFF IN ERROR

JOHN LOWELL,
JAMES A. LOWELL,

Attorneys for Plaintiff in Error.

BOSTON

GEO. H. ELLIS CO., PRINTERS, 272 CONGRESS STREET
1910

22

Supreme Court of the United States

No. 75.

OCTOBER TERM, 1910.

FORE RIVER SHIPBUILDING COMPANY,
PLAINTIFF IN ERROR

v.

SELMA T. HAGG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action of tort was brought in the Circuit Court of the United States for the District of Massachusetts by the plaintiff, a citizen of the Kingdom of Sweden, against the defendant, a corporation organized under the laws of the Commonwealth of Massachusetts. The action was brought under the Revised Laws of Massachusetts, Chapter 106, Sections 73-74, by the plaintiff as widow of Charles A. Hagg to recover for the death of her husband while in the employ of the defendant. The statute reads as follows:—

Revised Laws, Chapter 106, Section 73. "If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

"Section 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable. . . . The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars."

When the suit was entered in the Circuit Court, the defendant moved to dismiss the suit on the ground that the statute of Massachusetts under which the action was brought was of such a penal nature that the Circuit Court of the United States for the District of Massachusetts did not have jurisdiction (Record, page 6). The Court overruled the motion, and the defendant filed a bill of exceptions (Record, page 7); afterward the case was tried by a jury which returned a verdict for the plaintiff (Record, page 8); judgment was entered on the verdict, and the defendant sued out this writ of error (Record, page 10). The circuit judge by whom the motion to dismiss was overruled had already signed the following certificate (Record, page 9):—

"Now therefore the Court hereby certifies to the Supreme Court of the United States the questions of jurisdiction which has arisen upon the aforesaid motion to

dismiss and the overruling of said motion, to wit: whether or not the Statute under which the plaintiff's action was brought was of such a penal character that the Circuit Court did not have jurisdiction of said action."

FRANCIS C. LOWELL,
U. S. Circuit Judge.

SPECIFICATION OF ERRORS RELIED ON.

The plaintiff in error relies on the alleged error of the Court in overruling the motion to dismiss (Record, page 10).

BRIEF OF THE ARGUMENT.

The only question before this Court is that of the jurisdiction of the Circuit Court. This depends on the nature of the proceeding. The plaintiff in error contends that the proceeding is penal and can be enforced only in the courts of Massachusetts under the well-known doctrine that the courts of one country will not enforce the penal laws of any other country.

The Antelope, 10 Wheat. 66, 123.

Howarth v. Lombard, 175 Mass. 570.

Graham v. Monsergh, 22 Vt. 543.

This doctrine applies to the courts of the United States as well as to those of the several states.

Wisconsin v. Pelican Ins. Co., 127 U. S. 265.

Iowa v. C., B. & Q. & C. R.R., 37 Fed. Rep. 495.

Ferguson v. Ross, 38 Fed. Rep. 161.

Marshall v. Wabash R.R., 46 Fed. Rep. 269.

Hopper v. Denver, etc., R.R., 155 Fed. Rep. 273, 277.

There was no action for death at common law or under the rules of the Roman law.

1 Beven, Negligence, 3d ed., p. 182.

Insurance Co. v. Brame, 95 U. S. 754.

Carey v. Berkshire R.R., 1 Cush. 475.

Hugh v. N. O. & C. R.R., 6 La. An. 495.

Hermann v. Carrollton R.R., 11 La. An. 5.

Pollock, Torts (Am. ed. of 1891), page 56, note d.

Various reasons have been given for this rule, but the most appropriate seems to be that of Judge Christianey in *Hyatt v. Adams*, 16 Mich. 180 where he says, "for myself I think—and the form of expression in which the principle is announced by Lord Ellenboro would indicate that such was his opinion—that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations, to setting a price upon human life" (16 Mich. at page 191). In view of the expressions of the Supreme Court of Massachusetts hereinafter referred to, this seems to have been the opinion of the courts of that Commonwealth.

The Roman Law, like the Massachusetts law, imposed a fine for the death of a freeman.

Salkowski, Roman Law, page 685.

2 Roby, Roman Private Law, page 195.

The statute under which this action was brought is one of a very long list of statutes in Massachusetts relating to penalties imposed for negligently causing death, which differ entirely from the statutes of all other states or countries which follow Lord Campbell's Act, the object of which was to give compensation. (See Appendix for the Death Statutes of Massachusetts.)

The first law on the subject was passed by the Colony of

Massachusetts Bay in 1648, and provided a fine of one hundred pounds as a punishment for the loss of life on a highway or bridge (2 Col. Rec. 228). (This statute was cited in *Hill v. Boston*, 122 Mass. 344, but was overlooked in the case of *Hudson v. Lynn & Boston Street Railway*, 185 Mass. 510,—which we shall refer to hereafter.) It was re-enacted by the Province of Massachusetts Bay in 1693 (Prov. St. 1693-4, c. 6, § 6). In 1787 the Commonwealth of Massachusetts re-enacted this law and added the requirement that the fine should be recovered by indictment (1786, c. 81, § 7). When the Revised Statutes were passed in 1836, the amount of the fine was raised to \$1,000 (R. S., c. 5, § 21). In 1840, by Chapter 80 of the Acts of that year, common carriers were made liable for the loss of life of a passenger caused by their negligence or the unfitness or gross negligence of their servants. The fine was to be not less than \$500 nor more than \$5,000, to be recovered by indictment to the use of the executor for the benefit of the widow or heirs.

This was the state of Massachusetts legislation when Lord Campbell's Act was passed in England in 1846. As we have seen, for two centuries before that time there had been laws in Massachusetts relating to punishment for unintentional killing. There are also very early instances in the records of the Colony of Massachusetts Bay of fines for negligently causing death. In 1638 two persons were fined for leaving pits open in which children were drowned (1 Col. Rec. 233), and in 1640 "Richard Hollingworth, upon occasion of the death of Robert Baker, was fined ten pounds, to bee paid to the wife & children of the said Robert Baker, his negligence being the occasion of his death" (1 Col. Rec. 314). Later, in 1675, there are fines imposed for driving over a child and for accidentally shooting a child; in both cases

half of the fine being given to the father and half to the county (1 Rec. Court of Assistants, 54, 60).

Lord Campbell's Act was passed to compensate families of persons killed by accidents. The difference between this act and the statutes of Massachusetts is shown by Judge Metcalf in the case of *Carey v. Berkshire R.R. Co.*, 1 Cush. 475, where he says, "The English Parliament, by a very recent statute, (9 & 10 Vict. c. 93) have provided, that whenever the death of a person shall be caused by a wrongful act, neglect or default, which would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, the person, who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured shall have been caused under such circumstances as amount in law to felony; such action to be brought within 12 calendar months after such death, by and in the name of the executor or administrator of the person deceased, and to be for the benefit of the wife, husband, parent and children of the persons whose death shall have been so caused; and in such action the jury may give such damages, as they may think proportionate to the injury, resulting from such death, to the parties, respectively, for whose use such action shall be brought. And by our statute of 1840, c. 80, if the life of any passenger shall be lost, by the negligence or carelessness of the proprietors of a railroad, steamboat, stage coach, etc., or of their servants or agents, such proprietors shall be liable to a fine not exceeding \$5000, nor less than \$500; to be recovered by indictment to the use of the ~~executor~~ or administrator of the deceased person, for the benefit of his widow and heirs.

"These statutes are framed on different principles, and for different ends. The English statute gives dam-

ages, as such, and proportioned to the injury, to the husband, or wife, parents and children of any person whose death is caused by the wrongful act, neglect or default of another person; adopting to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum according to the degree of blame which attaches to the defendants and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth."

In 1853 railroads were made liable for the death of persons not passengers (employees excluded) who were in the exercise of due care (1853, Chap. 414). At this time the provisions relating to the liability of railroads for the death of passengers were still contained in the common carrier act of 1840. In 1860 the various statutes above recited were re-enacted. The laws relating to railroads were all contained in a chapter relating to them alone, and they were left out of the statute concerning common carriers (Gen. Sts., Chap. 44, § 21; Chap. 63, §§ 97-99; Chap. 160, § 34). In 1864 street railways were made liable for the negligence of their employees resulting in death to persons who were in the exercise of due care (1864, Chap. 229, §§ 37-38). This law was re-enacted in 1871 (1871, Chap. 381). In 1874 the laws relating to railroads were codified, but the provisions were not changed except that liability for death at a grade crossing was added. This had been first imposed by 1871, Chapter 352 (1874, Chap. 372, §§ 163, 164).

A civil action was first introduced by the act of 1881 (1881, Chap. 199). The statute contained the provision that damages should be assessed according to the degree of culpability. Three commissioners, two of whom were afterwards Judges of the Supreme Judicial Court of Massachusetts, were appointed to prepare a revision of the statutes. They left the indictment out of the laws relating to highways and common carriers, but retained it in those concerning railroads and street railways. These changes were embodied in the Public Statutes passed in 1882 (Pub. Sts., Chap. 52, § 17; Chap. 73, § 6; Chap. 112, §§ 212, 213). In these statutes, also, the laws relating to liability for death by railroads and street railways were combined in one section (Pub. Sts., Chap. 112, § 212), and they have so remained since that time. In 1883 railroads were made liable for the death of employees (1883, Chap. 243). In 1886 an action of tort was allowed against street railways (1886, Chap. 140).

The employers' liability act was passed in 1887 (1887, Chap. 270). It provided for compensation for the instantaneous death of an employee. In 1892 there was added a provision relative to death after conscious suffering (1892, Chap. 260). These provisions for compensation were changed by the Revised Laws under which the present action was brought. The damages are not there referred to as compensation (R. L., Chap. 106, §§ 72-74). In this case and in the other statutes herein-after referred to except those relating to railroads and street railways there was no provision for an indictment. In 1898 (1898, Chap. 565) all individuals and corporations were made liable for the death of persons not in their employ, extending an act of 1897, which related to gas and electric light corporations only (1897, Chap. 416).

In 1902 the various provisions of law were re-enacted in the Revised Laws of that year, with the omission of

the word "compensation" from the employers' liability act (R. L., Chap. 51, § 17; Chap. 70, § 6; Chap. 106, §§ 72-74; Chap. 111, §§ 267, 268; Chap. 171, § 2); and in 1906 the laws relating to railroads and street railways were codified, but without any change in their liability for death (1906, Chap. 436, Part 1, § 63; Part 2, § 245). In 1907 the limit of the liability of railroads and street railways for the death of all persons but employees was raised to \$10,000 and the word "gross" was eliminated from the statutes (1907, Chap. 375; Chap. 392). In 1909 the labor laws were codified, but the provisions relating to death were not changed (1909, Chap. 514, §§ 128, 129, 131).

We have seen that there have been death laws in Massachusetts for two centuries before Lord Campbell's Act. These laws were adopted as punishment on the wrong-doer, and not to provide compensation. Though they have sometimes been referred to as remedial, they have always been held to be penal in any case where the character of the law was involved in the issue. Judge Metcalf's opinion in the Carey case has already been referred to. Judge Morton in *Doyle v. Fitchburg Railroad*, 162 Mass. 66, says: "In considering the contract on the back of the ticket the fact that the statute was a penal one, must also be borne in mind. The word 'damages' is not used in a strictly legal sense. *Sackett v. Ruder*, 152 Mass. 397-403. Damages are to be assessed not less and not more than a certain amount, and with reference to the degree of culpability of the corporation, its servants or agents. Originally, the remedy was by indictment. Afterwards it was extended to an action of tort. . . . And whether the amount is recovered by indictment or in an action of tort it goes in every case to the widow and children and next of kin and the executor or administrator has no interest in it. It is in substance a

penalty given to the widow and children and next of kin, instead of to the Commonwealth, and as such the intestate could not release the defendant from liability for it."

Mr. Justice Holmes said in *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478: "But the present action is statutory and penal in its character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in *Little v. Dusenberry*, 17 Vroom, 614. . . . It creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be 'assessed with reference to the degree of culpability of the corporation, or of its servants or agents.' P. S., Chap. 112, Sec. 212. See *Carey v. Berkshire Railroad*, 1 Cush. 475, 480; *Commonwealth v. R.R.*, 108 Mass. 7-12."

See also *Comm. v. Verm. & Mass. R.R.*, 108 Mass. 7.
Comm. v. B. & L. R.R., 134 Mass. 211.

Ramsdell v. N. Y. & N. E. R.R., 151 Mass. 245.

Young v. N. Y., N. H. & H. R.R., 171 Mass. 33.

Worcester St. Ry. v. Travellers Ins. Co., 180 Mass. 263.

Williams, Statutory Torts in Mass., 2nd ed., §§ 147, 148.

2 Wharton, Conflict of Laws, 3d ed., § 480a.

Finally, the Supreme Judicial Court of Massachusetts in a very able and learned opinion by Loring, J., held that the death statutes of Massachusetts are criminal laws.

Hudson v. Lynn & Boston St. Ry., 185 Mass. 510, affirmed in
Jones v. Boston & Northern St. Ry., 205 Mass. 108.

He expressly included the employers' liability act with the others as a penal statute. He says, "It will be plain, from what is said hereafter, that the employers' liability act, in what is now R. L. c. 106, Sec. 73, which was taken from the English act following Lord Campbell's act, is so far modified by section 74, in spite of what is now section 72, as to be a part of this system." 185 Mass. at page 514.

This opinion is, undoubtedly, a sound one. From 1648 till 1881 there was no provision for a civil action. During all that time the proceedings were criminal in form, and the statute was construed as a penal statute.

Casey v. Berkshire R.R., 1 Cush. 475.

Comm. v. Vermont & Mass. R.R., 108 Mass. 7.

In order that there might be no misunderstanding of the intent of the Legislature in passing the Act of 1881 it was provided under that Act that the damages were to be assessed according to the degree of culpability. This provision was not necessary in the previous laws because they were criminal proceedings, and the amount of the fine would be proportioned to the degree of guilt.

Casey v. Berkshire R.R., 1 Cush. 475, 480.

Hudson v. Lynn & Bost. St. Ry., 185 Mass. 510, 518.

Adams v. R.R., 67 Vt. 76.

The use of these words shows that the Legislature did not mean to change the nature of the proceeding, but meant the new proceeding to be a mere substitute for the old. It has been so held.

Littlejohn v. Fitchburg R.R., 148 Mass. 478.

All the death statutes since 1881 have retained the same criterion of the amount of damages. They are not in proportion to the amount of injury as they are under the death statutes of other states and countries, but are determined by the degree of the defendant's wrong, showing conclusively that the object of the statute is punishment and not compensation. The statute of 1907 (Chapter 352) which, as we have seen, omits the word "gross" from the law imposing liability for death due to the negligence of the servants or agents of railroads and street railways has been held very recently to be a penal statute.

Jones v. Boston & Northern St. Ry., 205 Mass. 108.

The history of the employers' liability act under which this suit is brought shows in a striking manner that the purpose of the statute is not compensation. By the original Act of 1887 the damages to be recovered for the death of an employee were referred to as "compensation." The Supreme Judicial Court of Massachusetts regarded these words as improperly used (*infra*, page 13). When the Revised Laws were passed in 1902, these words were omitted. The basis of recovery had always been the degree of culpability of the employer, and in order that no misunderstanding might arise from the use of the word "compensation" the Legislature struck it out of the revision of 1902.

It is undoubtedly the law in Massachusetts to-day that there is no manner of compensating for the loss of human life. Judge Lord said in 1881, "The value of human life has never yet been left in this Commonwealth to be estimated by a jury, and no attempt has ever been made to fix a money value to human life" (*Barrett v. Dolan*, 130 Mass. 366, 367), and Judge Knowlton, speak-

ing of the employers' liability act in its first form, says, "The expression 'compensation in lieu thereof' does not very aptly characterize the recovery authorized; for there is no mode of estimating 'compensation' for the death of a man, and the amount to be recovered is required to be assessed with reference to the degree of culpability of the employer" (*Ramsdell v. N. Y. & N. E. R.R.*, 151 Mass. 245, 249).

The distinction between laws like Lord Campbell's Act and those inflicting punishment for death is well illustrated by various cases in other jurisdictions. The courts of Rhode Island refused to enforce the statute of Massachusetts relating to the death of a passenger on the ground that it was a penal act (*O'Reilly v. N. Y. & N. E. R.R.*, 16 R. I. 388), but did enforce the Connecticut statute allowing damages for failure to ring a bell at a grade crossing (*Gardner v. N. Y. & N. E. R.R.*, 17 R. I. 790). In the later case the Court points out the distinction at page 792. The Illinois courts have refused to enforce a statute of Missouri imposing a penalty of \$5,000 for death (*Raisor v. Chicago & Alton R.R.*, 215 Ill. 47), but have enforced the Indiana statute allowing the recovery of damages not exceeding \$10,000 (*Chic. & E. Ills. R.R. v. Rouse*, 178 Ill. 132).

See also

Philpott v. The Mo. Pac. Ry., 85 Mo. 164.

Casey v. Transit Co., 116 Mo. Ap. 235.

Pratt v. Mo. Pac. Ry. Co., 122 S. W. Rep. 1125.

Dale v. R.R., 57 Kan. 601.

Matheson v. R.R., 61 Kan. 667.

1 White, Personal Injuries on Railroads, § 52.

Another consideration which shows the difference between Lord Campbell's Act and the Massachusetts

statute is that under the former the liability can be released, but not under the latter.

Read v. Great Eastern Ry., L. R. 3 Q. B. 555.
Southern Bell Tel. Co. v. Cassin, 111 Ga. 575.
Hill v. Pennsylvania R.R., 178 Pa. St. 223.
Doyle v. Fitchburg R.R., 162 Mass. 66.

The cases which have been determined in this court have all been brought under Acts like Lord Campbell's Act, and the decisions are not conclusive of the case at bar.

Railroad Co. v. Barron, 5 Wall. 90.
Dennick v. R.R., 103 U. S. 11.
Texas & Pac. Ry. v. Cox, 145 U. S. 593.
Northern Pac. R.R. v. Babcock, 154 U. S. 190.
Stewart v. B. & O. R.R., 168 U. S. 445.

Railroad Co. v. Barron was a suit brought on a statute allowing the jury to give "such damages as they shall deem fair and just compensation with reference to the pecuniary injuries resulting from said death." In *Dennick v. Railroad*, which is justly regarded as the leading case on this subject, the statutory provision was the same, and the counsel for the plaintiff in error whose argument is printed did not contend that the statute was penal, and Mr. Justice Miller says, "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury."

Texas Railway Co. v. Cox arose on a statute which Mr. John F. Dillon, counsel for the plaintiff in error, did not contend was penal, and Mr. Chief Justice Fuller

disposes of this phase of the case by quoting the remarks of Mr. Justice Miller just referred to. In the Babcock case the statute provided that "such damages may be given as under all the circumstances of the case may be just." Mr. Justice White quotes with approval the remarks already cited. Finally, in the Stewart case Mr. Justice Brewer says: "The purpose of the several statutes passed in the states, in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death."

We have already seen that the Massachusetts statute differs entirely from Lord Campbell's Act. The Supreme Judicial Court of Massachusetts said, "Since the Massachusetts acts are exactly what Lord Campbell's act is not, it is of no consequence that in states where Lord Campbell's act has been enacted the recovery can be had under circumstances like those now in question" (*Hudson v. Lynn & Boston St. Ry.*, 185 Mass. at page 519).

The question whether the Massachusetts death statutes would be enforced outside of the jurisdiction has been decided in Vermont and Rhode Island adversely on the ground that the statutes were penal.

Adams v. R.R., 67 Vt. 76.

O'Reilly v. N. Y. & N. E. R.R., 16 R. I. 388.

The same result was arrived at in two cases in the Federal Court for the first circuit.

Lyman v. B. & A. R.R., 70 F. R. 409.

Perkins v. B. & A. R.R., 90 F. R. 321.

But in *Boston & Maine Railroad v. Hurd* (108 F. R.

116) the Court of Appeals for the first circuit, consisting of Colt, Putnam, and Brown, JJ., in an opinion by Putnam, J., overruled the two former cases, and held that the act was compensatory, and therefore could be enforced in the United States Court. The opinion on this point was unnecessary, as the case turned on the fact that suit under the statute had not been brought within the time required by it. The Vermont and Rhode Island cases were not brought to the attention of the learned judge, nor did he mention the Carey case, which, as we have seen, decided clearly the penal character of the Massachusetts laws. In fact, the judge cites no cases in Massachusetts earlier than 121 Mass., and says "it is not necessary to go back in the legislation of Massachusetts to the origin of the first portion of Sec. 212, Chap. 112 of the Public Statutes to which we have referred" (108 F. R. at page 120).

At the time this case was decided the Massachusetts Court had not decided *Hudson v. Lynn & Boston Railroad*, and Judge Putnam says "the matter has not been directly decided by the Supreme Judicial Court of Massachusetts" (108 F. R. at page 121).

We may hazard the opinion that, if the Massachusetts Court had decided the Hudson case before the Hurd case was argued, and if the attention of the Court had been directed to the Vermont and Rhode Island cases and to the Carey case, or if the learned judge had understood the history of the Massachusetts statute, his opinion would have been different.

It is further to be observed that none of the learned judges were Massachusetts lawyers, two of them being citizens of Rhode Island and the other a citizen of Maine. The statutes of both of these states are very different from that of Massachusetts: this would naturally affect the minds of the Court. In Maine the statute has been

held to be remedial (*State v. Grand Trunk Ry.*, 58 Maine, 176), and the present law provides for fair compensation not exceeding \$5,000 (Rev. Sts. of Maine, Chap. 89, § 9, re-enacting 1891, Chap. 124, § 1), and in Rhode Island the statutes are very liberal (Gen. Laws of R. I. (1896), Chap. 233, § 14). In that state there was formerly the unusual provision that any person having a direct pecuniary interest in the continuance of the life of the deceased might have an action (Gen. Sts. of R. I. (1872), Chap. 193, § 18). The New Hampshire law, which appears by the opinion to have had great weight with Judge Putnam, is also different from that of Massachusetts. In that state the courts have held the death statute to be compensatory (*Carney v. R.R.*, 72 N. H. 364).

Judge Putnam at the outset decides that the action is barred by the one year limitation contained in the statute, and then says, "but as it is impossible to foresee what phases the case may assume in the future, we deem it advisable to express our views on the other questions which we have stated" (108 F. R. at page 119). It is difficult to see what other phases the case could assume except that of *rigor mortis*. The case was dead and could not be resurrected, and the rest of the opinion is therefore uncalled for and not binding on any court. It is a legal essay on an interesting topic, but unconnected with any issue. Judge Putnam followed this case in *McCabe v. Am. Woolen Co.*, 124 F. R. 283; but in this case the decision turned on another point, as it was held on demurrer that the declaration did not state a cause of action. Judge Lowell also followed the Hurd case in *Malloy v. Am. Hide and Leather Co.*, 148 F. R. 482, in a case involving the employers' liability act of Massachusetts, the same act which is involved in the case at bar. The learned judge, however, evidently decided

the case under compulsion, as he says: "As a higher federal court than this has held the action to be maintainable, this court will regard itself as bound by that decision, notwithstanding the expressions of the Supreme Court of Massachusetts in *Hudson v. Lynn & Boston R.R.*" (148 F. R. at page 484). This opinion also was a dictum, as the court held that the plaintiff could not recover because the deceased was operating an elevator contrary to a statute.

We have seen that the Massachusetts Court has held the death statutes to be criminal laws, and this determination of their character should be conclusive on all other courts. It is true that it has been held that the question of the nature of a law like this is an international one, and the local decision is not binding on the Court which is asked to enforce the law.

Huntington v. Attrill, 146 U. S. 657.

The test applied in *Huntington v. Attrill*, as to whether a law is enforceable outside of the local forum, is whether the purpose of the law is to punish an offence against the public justice of the state or to afford a private remedy to a person injured by the wrongful act (146 U. S. at page 668). The Privy Council of England in a case of the same name involving the same question stated the rule in substantially equivalent terms. Lord Watson says "accordingly no proceeding, even in the shape of a civil suit which has for its object the enforcement by the state whether directly or indirectly of punishment for such breaches by the *lex fori*, ought to be admitted in the courts of any other country" ((1893) A. C. 150, 156). We have seen that the courts of Massachusetts have held the death statutes to be laws imposing punishment. There can be no doubt that the statutes are in their nature punitive and not compensatory, and this

Court, even if it felt itself free to disregard the decision of the highest court of Massachusetts, would come to the same conclusion. (See 2 Wharton, *Conflict of Laws*, 3d ed., § 480a.)

It is to be observed that *Huntington v. Attrill* was not a case which arose in a federal court, and that the provisions of the Judiciary Act requiring federal courts to follow the state laws was not involved. The case therefore is not an authority for the proposition that the decision by a state court as to the criminal nature of its statute can be disregarded by a United States court.

The doctrine of *Huntington v. Attrill* should not be applied in a case arising in a United States court. If a suit were brought in the courts of another state, the decision of Massachusetts would be binding. Every state must be allowed to determine for itself what it considers to relate to its criminal law. The result in an action in a federal court should be the same.

The Judiciary Act provides: "And be it further enacted: That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply" (1 Stat. 92. Re-enacted in the Revised Stats., § 721).

This has been held to apply to the statutes of the state. It is true that in *Swift v. Tyson*, 16 Pet. 1, the Court held that the word "laws" in the Judiciary Act did not include judicial decisions, but Mr. Justice Story expressly stated that it did refer to the statutes of a state (16 Pet. at page 18). From the case of *Swift v. Tyson* has arisen the doctrine of this court that, in any controversy between citizens of different states on subjects of general commercial law, the United States Courts are

not bound by the decision of the state courts. This doctrine has been subject to severe criticism by members of this Honorable Court and other acute legal minds (*B. & O. Railroad v. Baugh*, 149 U. S. 368, 399, by Mr. Justice Field; *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 370, by Mr. Justice Holmes; Gray, *Nature and Sources of Law*, page 238. See also Pepper, *Borderland of Federal and State Decisions*; Rand, *Swift v. Tyson versus Gelpcke v. Dubuque*, 8 Harv. L. Rev. 328). As we have seen, it never covered the case of a state statute, and even in cases coming under the rule it is competent for the state to enact a statute declaring the law, and such statute will be binding on federal courts.

Chicago, M. & St. P. Ry. v. Solan, 169 U. S. 133.
Martin v. Pittsburg R.R., 203 U. S. 284. See also
Penn R.R. v. Hughes, 191 U. S. 477; *Weir v. Rountree*, 173 F. R. 776.

The question in this case is not one of general law. It is a local matter depending on the construction put by the state court on one of its own statutes, and this decision is binding on the federal courts. The true scope of the doctrine of *Swift v. Tyson* is that in cases arising between citizens of different states the courts of the United States must have the power to prevent injustice being done by the application of the rules of the local law to the rights of a citizen of another state.

Burgess v. Seligman, 107 U. S. 20, 34.
Kuhn v. Fairmount Coal Co., 215 U. S. 349, 360.
 Thayer's Legal Essays, page 152.

This is not such a case, as there was nothing to prevent the plaintiff from bringing her suit in the state court.

We have seen in our review of the Massachusetts Statutes that the indictment is left in the laws relating to death on railways or street railways. It could not be held that an indictment would lie in a federal court against a railroad (*State v. Grand Trunk Ry.*, 3 F. R. 887). There would be no machinery for bringing an indictment, which of course is a part of the criminal procedure of the Commonwealth of Massachusetts. But the action is a mere substitute for the indictment (*Littlejohn v. Fitchburg R.R.*, 148 Mass. 478), and should be governed by the same considerations.

The federal courts hold that the determination by the State Court of whether aliens can take advantage of death statutes is binding on them (*Fulco v. Schuylkill Co.*, 169 F. R. 98). The determination by state courts of the general character of such acts should also be held binding.

The Circuit Courts of the United States have jurisdiction over controversies between citizens of different states of suits of a civil nature at common law or in equity where the amount involved exceeds \$2,000. We have seen that the present suit is not one of a civil nature. The Circuit Court therefore had no jurisdiction over it.

1 Rose, Federal Procedure, page 102.

By its attorneys,

JOHN LOWELL.

JAMES A. LOWELL.

APPENDIX.

MASSACHUSETTS LAWS CONCERNING LIABILITY FOR DEATH.

COLONY ACT OF 1648.

This Corte considering the great pill w^{ch} men, horses, teames, & oth^r cattell are exposed to, by reason of defective bridges & high wayes between Boston & Salem, & elsewhere in this jurisdiction, it is therefore ord^{red}, that if any pson loose his life in pas[sing] any bridge or high way aforesaid, (after due warning given of such defective wayes & bridges,) the country or towne who ought to secure such wayes or bridges shall pay a fine of 100^t to the parents, wife, or children of the party so deceased.

March, 1648. 2 Records of the Colony of the Massachusetts Bay in New England, page 228.

[This act was revised and published in October, 1658, in slightly different terms. See Colonial Laws of Massachusetts (Boston, 1889), page 126.]

PROVINCE LAW OF 1693.

That if, through neglect or not keeping in sufficient repair any highway, causeyway, or bridge, any person happen to lose his life in passing in such highway, causeyway, or bridge, or lose a limb, break a bone, or receive any bruise or breach in any part of his body, through any defect in or want of necessary repair of such highway, causeyway, or bridge, the county or town respectively to which of right it belongs to maintain and keep the

same in repair, having been warned or notified of such defect and need of repairs, and amendment thereof, either in writing, under the hand of two witnesses, or by presentment thereof made at the sessions of the peace, shall pay unto the parents, husband, wife, children or next of kin to any person so losing his or her life the sum of one hundred pounds.

Prov. St. 1693-4, c. 6, § 6, 1 Prov. Laws (State ed.), 137.

MASSACHUSETTS LAW OF 1787.

And if the life of any person shall be lost through the deficiency of the way, causeway, or bridge, or for want of rails on any bridge, the county, town, or persons who are by law obliged to repair and amend the same, shall be liable to be amerced in *One Hundred Pounds*, to be paid to the executor or administrator of the deceased, for the use of the heirs, devisees, or creditors, upon a conviction before the Court of General Sessions of the Peace, or Supreme Judicial Court, on a presentment or indictment of the Grand Jury. *Provided*, The county, town, or other person or persons, who of right ought to maintain and keep the same in repair, had been previously notified of such want of repair and amendment, in writing, under the hands of two or more credible witnesses, or by the presentment of the Grand Jury, or by information of the Attorney-General, or the person acting for the Government in his absence, filed in the Court of General Sessions of the Peace, or the Supreme Judicial Court.

St. 1786, c. 81, § 7. Passed March 5, 1787.

REVISED STATUTES (1836), CHAPTER 25, SECTION 21.

If the life of any person shall be lost, by reason of any defect or want of repair of any highway, town way, cause-

way or bridge, or for want of suitable rails on such way or bridge, the county, town or person, that is by law obliged to repair the same, shall be liable to a fine of one thousand dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person for the benefit of his heirs, devisees or creditors; provided, that the said county, town or person, shall have had previous reasonable notice of such defect or want of repair of such way or bridge.

ACTS OF 1840, CHAPTER 80.

An Act concerning Passenger Carriers.

If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any rail-road, steam-boat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole to the widow, and if no widow, to heirs according to the law regulating the distribution of intestate personal estate among heirs.

RAILROAD LAW OF 1853, CHAPTER 414.*An Act concerning the Liability of Railroad Corporations
for Loss of Life in Certain Cases.*

SECT. 1. If, by reason of the gross negligence, carelessness or unfitness of the servants or agents of any railroad corporation in this commonwealth, while engaged in the business of such corporation, or by reason of the negligence or carelessness of such corporation, the life of any person, not being a passenger or employee of such corporation, shall be lost, such person being in the exercise of due care and diligence, such corporation shall be liable to a fine not exceeding five thousand dollars, and not less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of such deceased person, for the benefit of his widow and children, one moiety thereof to belong to his widow, and one moiety to his children, but if there shall be no children, the whole to his widow, and if no widow nor child, the whole to his heir at law.

SECT. 2. No railroad corporation shall be liable to the fine mentioned in the preceding section, for the loss of life by any person while walking or being upon any railroad contrary to law, or to the reasonable rules and regulations of such corporation.

SECT. 3. All indictments against any railroad corporation for loss of life, shall be prosecuted within one year from the injury causing the death.

SECT. 4. Any person who shall without right, knowingly stand or walk on any railroad track, shall be liable to a penalty of not less than five dollars, nor more than fifty dollars, to be recovered to the use of the commonwealth on complaint before any justice of the peace or police court in the county where the offence is committed.

GENERAL STATUTES (1860).
HIGHWAY LAW, CHAPTER 44, SECTION 21.

If the life of a person is lost by reason of a defect or want of repair of a highway, town way, causeway, or bridge, or for want of suitable rails on such way or bridge, the county, town, or person, by law obliged to repair the same, shall be liable to a fine of one thousand dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person, for the benefit of his heirs, devisees, or creditors: *provided*, that the county, town, or person, had previous reasonable notice of the defect or want of repair of such way or bridge.

RAILROADS, CHAPTER 63, SECTION 97.

If by reason of the negligence or carelessness of a corporation, or of the unfitness or gross negligence or carelessness of its servants or agents, the life of any person being a passenger is lost, the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties, but if there are no children to the use of the widow, or if no widow to the use of the next of kin.

Section 98:—

If by reason of the negligence or carelessness of a corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost, the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by

indictment and paid to the executor or administrator for use of the widow and children as provided in the preceding section: *provided*, that the corporation shall not be so liable for the loss of life by any person while walking or being upon its road contrary to law or the reasonable rules or regulations of the corporation

Section 99:—

Indictments against a corporation for loss of life shall be prosecuted within one year from the injury causing the death.

COMMON CARRIERS, CHAPTER 160, SECTION 34.

If the life of any person, being a passenger, is lost by reason of the negligence or carelessness of the proprietor or proprietors of any steamboat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor or proprietors, and common carriers, shall be punished by fine not exceeding five thousand, nor less than five hundred dollars, to be recovered by indictment, and paid to the executor or administrator, for the use of the widow and children of the deceased in equal moieties; but if there are no children, to the use of the widow, and if no widow, to the use of the next of kin.

STREET RAILWAY LAW OF 1864, CHAPTER 229.

An Act concerning Street Railway Corporations.

Section 37:—

If by reason of the negligence or carelessness of a street railway corporation, or of the unfitness, negligence, or carelessness of its servants or agents, the life of any

person, being a passenger, in the exercise of due care, or of any person being in the exercise of due care, and not being a passenger, or in the employment of such corporation, is lost, the corporation shall be punished by a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, and paid to the executor or administrator, for the use of the widow and children of the deceased, in equal moieties; but if there are no children, to the use of the widow, or if no widow, to the use of the next of kin.

Section 38:—

Indictments against a street railway corporation, for loss of life, shall be prosecuted within one year from the time of the injury causing the death.

STREET RAILWAY LAW OF 1871, CHAPTER 381.

An Act concerning Street Railway Corporations.

Section 49 re-enacts in the same terms the provisions of Section 37 of the above Act.

Section 50 re-enacts in the same terms the provisions of Section 38 of the above Act.

GRADE CROSSING ACT OF 1871.

An Act for the Better Protection of Travellers at Railroad Crossings. 1871, Chapter 352, Section 1.

If a person is injured in his person or property by collision with the engine or cars of a railroad corporation passing over a grade crossing of a public way or travelled place, such as is described in section one of chapter eighty-one of the Acts of the year eighteen hundred and sixty-two, and it appears that the corporation neglected to give the signals required by said section, and that such

neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in the ninety-eighth section of the sixty-third chapter of the General Statutes, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury.

RAILROAD LAW OF 1874, CHAPTER 372.

An Act to revise and consolidate the Provisions of the General Statutes and of Subsequent General Acts relating to Railroads.

Section 163:—

If by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger is lost; or the life of any person being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost; in either case, the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties, but if there are no children to the use of the widow, or if no widow, to the use of the next of kin: *provided*, that the corporation shall not be so liable for the loss of life by any person while walking or being upon its road contrary to law or the reasonable rules and regulations of the corporation.

Indictments against a corporation for loss of life shall be prosecuted within one year from the injury causing the death.

Section 164:—

If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, such as is described in section one hundred and twenty-three, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence or unlawful act contributed to the injury.

ACT OF 1881 AUTHORIZING ACTIONS OF TORT.
1881, CHAPTER 199.

An Act providing for the Trial of Actions against Railroad Corporations, Common Carriers, and Towns for Loss of Life by Negligence.

SECTION 1. If by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of any person, being a passenger, is lost; or the life of any person, being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost,—in either case the corporation shall be liable in damages not ex-

ceeding five thousand dollars, nor less than five hundred dollars, to be assessed with reference to the degree of culpability of said corporation or of its servants or agents and to be recovered in an action of tort, by the executor or administrator of the deceased person for the use of the widow and children of the deceased, in equal moieties; but if there are no children, to the use of the widow, or if no widow, to the use of the next of kin: *provided*, that the corporation shall not be so liable for the loss of life by any person while walking or being upon its road contrary to law or the reasonable rules and regulations of the corporation.

SECTION 2. If a person is injured in his person, or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section one hundred and twenty-three of chapter three hundred and seventy-two of the acts of the year eighteen hundred and seventy-four, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision; and in case the life of a person so injured is lost the corporation shall be liable in damages recoverable as provided in the preceding section of this act, unless it is shown that in addition to the mere want of ordinary care the person injured or the person having charge of the person or property injured was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and such gross or wilful negligence or unlawful act contributed to the injury.

SECTION 3. If the life of any person, being a passenger, is lost by reason of the negligence or carelessness of the proprietor or proprietors of any steamboat or stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their

servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed and recovered in an action of tort, in the manner and to the uses provided in section one.

SECTION 4. If the life of a person is lost by reason of a defect or want of repair of a highway, town way, causeway or bridge, or for want of suitable rails on such way or bridge, the county, town, or person by law obliged to repair the same shall be liable in damages not exceeding one thousand dollars, to be assessed and recovered in an action of tort, in the manner and to the uses provided in section one: *provided*, that the county, town, place, or person had previous reasonable notice of the defect or want of repair of such way or bridge.

SECTION 5. No action shall be prosecuted under this act unless it be begun within one year from the injury causing the death.

SECTION 6. The remedy provided by this act shall be additional to the remedy provided by sections one hundred and sixty-three and one hundred and sixty-four of chapter three hundred and seventy-two of the acts of the year eighteen hundred and seventy-four; but no executor or administrator shall avail himself of more than one of these remedies for the same cause.

PUBLIC STATUTES (1882).
HIGHWAYS, CHAPTER 52, SECTION 17.

If the life of a person is lost by reason of a defect or want of repair of a highway, town way, causeway, or bridge, or for want of suitable rails on such way or bridge, the county, town, or person by law obliged to repair the same shall be liable in damages not exceeding one thousand dollars, to be assessed with reference

to the degree of culpability of the county, town, or person liable, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased in equal moieties, or, if there are no children, to the use of the widow, or, if no widow, to the use of the next of kin: *provided*, that the county, town, or person had previous reasonable notice of the defect or want of repair of such way or bridge.

COMMON CARRIERS, CHAPTER 73, SECTION 6.

If the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steam-boat or stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased in equal moieties, or, if there are no children, to the use of the widow, or, if no widow, to the use of the next of kin.

RAILROADS AND STREET RAILWAYS, CHAPTER 112, SECTION 212.

If by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of

the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than five hundred nor more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation, it shall also be liable in damages, not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section.

Section 213:—

If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section one hundred and sixty-three, and it appears that the corporation neglected to give the signals required by said

section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in the preceding section, or, in case the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person having charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury.

ACT OF 1883 CONCERNING EMPLOYEES OF RAILROADS.
1883, CHAPTER 243.

*An Act fixing the Responsibility of Railroad Corporations
for Negligently Causing Death of Employees.*

Section two hundred and twelve of chapter one hundred and twelve of the Public Statutes, is hereby amended by inserting after "indictment" in the twenty-second line, the following words, "and if an employee of such corporation being in the exercise of due care is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation, if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee."

ACT OF 1886 RELATING TO ACTIONS OF TORT AGAINST
STREET RAILWAYS. 1886, CHAPTER 140.

An Act authorizing Actions of Tort against Street Railway Corporations for Loss of Life by Negligence.

If by reason of the negligence or carelessness of a corporation operating a street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger or of a person, being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corporation shall be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of said corporation or of its servants or agents, and to be recovered in an action of tort commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or if there are no children, to the use of the widow; or if no widow to the use of the next of kin. But no executor or administrator shall for the same cause avail himself of more than one of the remedies given by this act and section two hundred and twelve of chapter one hundred and twelve of the Public Statutes.

EMPLOYERS' LIABILITY ACT OF 1887. 1887, CHAPTER
270.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Employees in their Service.

SECTION 1. Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:—

(1) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad, the employee, or in case the injury results in death the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work.

SECTION 2. Where an employee is instantly killed or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages therefor and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

SECTION 3. The amount of compensation receivable

under this act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death, compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this act shall be maintained, unless notice of the time, place and cause of the injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: *provided*, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

SECTION 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

SECTION 5. An employee or his legal representatives shall not be entitled under this act to any right of com-

pensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had entrusted to him some general superintendence.

SECTION 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered under this act, or to any relief society formed under chapter two hundred and forty-four of the acts of the year eighteen hundred and eighty-two, as authorized by chapter one hundred and twenty-five of the acts of the year eighteen hundred and eighty-six, may prove, in mitigation of the damages recoverable by an employee under this act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

SECTION 7. This act shall not apply to injuries caused to domestic servants, or farm laborers, by other fellow employees, and shall take effect on the first day of September, eighteen hundred and eighty-seven.

**AMENDMENT OF 1892 OF THE EMPLOYERS' LIABILITY
ACT. 1892, CHAPTER 260.**

Section 1 of this Act amends Section 1 of the Act of 1887 by adding at the end the following words:—

And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may in the action brought under this section, except as

hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act, to bring an action for instantaneous death. If there are no such persons then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable.

Section 2 amends Section 3 of the Act of 1887 by inserting in the proper place the words "which follows instantaneously or without conscious suffering," so that the provisions of that Section regarding liability for death shall apply only to instantaneous death.

ACT OF 1897 RELATING TO GAS AND ELECTRIC LIGHT CORPORATIONS. 1897, CHAPTER 416.

An Act to authorize Actions of Tort against Gas and Electric Light Corporations for the Loss of Life by Negligence.

If by reason of the negligence or carelessness of a corporation operating a gas or electric light plant or system, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a person who is exercising due diligence and who is not in the employment of such corporation, is lost, the corporation shall be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed with reference to the degree of culpability of said corporation or of its servants or agents, and to be

recovered in an action of tort commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or if there are no children, for the use of the widow; or if there is no widow, for the use of the next of kin.

ACT OF 1898 RELATING TO ALL PERSONS AND CORPORATIONS. 1898, CHAPTER 565.

An Act Relative to the Liability of Persons and Corporations for Negligence resulting in the Death of Persons not in their Employ.

If, by reason of the negligence or carelessness of any person or corporation, or of the gross negligence or carelessness of any servant or agent of any person or corporation while engaged in the business of such person or corporation, the life of a person who is exercising due diligence and who is not in the employ or service of such person or corporation is hereafter lost, such person or corporation shall be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed with reference to the degree of culpability of such person or corporation, or of the servants or agents of such person or corporation, and to be recovered in an action of tort commenced within one year from the injury which caused death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased in equal moieties; or if there are no children, to the use of the widow; or if there is no widow, to the use of the next of kin.

REVISED LAWS (1902).
HIGHWAYS, CHAPTER 51, SECTION 17.

If the life of a person is lost by reason of a defect or a want of repair of or a want of a sufficient railing in or upon a way, causeway or bridge, the county, city or town or person by law obliged to repair the same shall, if it or he had previous reasonable notice of the defect or want of repair or want of railing, be liable in damages not exceeding one thousand dollars, which shall be assessed with reference to the degree of culpability of the defendant and recovered in an action of tort, commenced within one year after the injury causing the death by the executor or administrator of the deceased person, for the use of the widow and children of the deceased in equal moieties, or, if there are no children, to the use of the widow, or, if there is no widow, to the use of the next of kin.

COMMON CARRIERS, CHAPTER 70, SECTION 6.

If the proprietor of a steamboat or stage coach or a common carrier of passengers, except a railroad corporation or street railway company, by reason of his or its negligence, or by reason of the unfitness or gross negligence or carelessness of his or its servants or agents, causes the death of a passenger, he or it shall be liable in damages in the sum of not less than five hundred nor more than five thousand dollars which shall be assessed with reference to the degree of culpability of the proprietor or common carrier liable, or of his or its servants or agents, and shall be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half to the use of the widow and one-half

to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin.

EMPLOYERS' LIABILITY, CHAPTER 106, SECTION 72.

If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

Section 73:—

If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

Section 74:—

If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employee, in which no damages

for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars.

**RAILROADS AND STREET RAILWAYS, CHAPTER 111,
SECTIONS 267 AND 268.**

Section 267:—

If a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than five hundred nor more than five thousand dollars which shall be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, and shall be paid to the executor or administrator, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next

of kin; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than five thousand dollars, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by the provisions of this section.

Section 268:—

If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section one hundred and eighty-eight and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in the preceding section, or, if the life of a person so injured is lost, to damages recoverable in an action

of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury.

PERSONS AND CORPORATIONS, CHAPTER 171, SECTION 2.

If a person or corporation by his or its negligence, or by the gross negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than five thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin.

ACT OF 1906 RELATIVE TO RAILROADS AND STREET RAILWAYS.

Chapter 463, Part I., Section 63, re-enacts in the same terms Section 267 of Chapter 111, of the Revised Laws.

Part II., Section 245, re-enacts in the same terms the provisions of Section 268 of said Chapter.

ACT OF 1907 RELATING TO RAILROADS AND STREET
RAILWAYS, CHAPTER 392, SECTION 1.

An Act to increase the Penalty Imposed on a Railroad or Street Railway Corporation for Loss of Life through its Negligence.

Section sixty-three, Part I., of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six is hereby amended by striking out the word "gross," in the third line, by striking out the words "five thousand," in the eighth and twenty-first lines, and inserting in place thereof in each case the words:—ten thousand,—and by striking out the words "in the same manner and to the same extent," in the thirty-first and thirty-second lines, and inserting in place thereof the words:—in the sum of not less than five hundred nor more than five thousand dollars, in the same manner,—so as to read as follows:—Section 63. If a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars which shall be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, and shall be paid to the executor or administrator, one half thereof to the use of the widow and one half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin; but a corporation which operates a railroad shall not be so liable for the

death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the sum of not less than five hundred nor more than five thousand dollars, in the same manner as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by the provisions of this section.

ACT OF 1907 RELATING TO NEGLIGENCE OF PERSONS OR CORPORATIONS, CHAPTER 375, SECTION 1.

An Act Relative to the Recovery of Damages for Death Caused by the Negligence of Persons or Corporations, or of the Agents or Servants thereof.

Section two of chapter one hundred and seventy-one of the Revised Laws is hereby amended by striking out the word "gross," in the second line, by striking out the word "five," in the sixth line, and inserting in place thereof the word:—ten,—and by striking out the words "one year," in the ninth line, and inserting in place

thereof the words:—two years,—so as to read as follows:—
Section 2. If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within two years after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin.

ACT OF 1909, CHAPTER 514.

An Act to codify the Laws relating to Labor.

Section 128 re-enacted the provisions of Revised Laws, Chapter 106, Section 72, in the same terms, with the addition of a provision as to procedure.

Section 129 re-enacted in the same terms the provisions of Section 73 of Chapter 106 of the Revised Laws.

Section 131 re-enacted in the same terms the provisions of Section 74 of Chapter 106 of the Revised Laws.



Office Supreme Court, U. S.

DEC 16 1910

JAMES H. MCKENNEY,

In the
Supreme Court of the United States

OCTOBER TERM, 1910

No. 75

Fore River Shipbuilding Company

PLAINTIFF IN ERROR

v.

Selma T. Hagg

IN ERROR TO THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MASSACHUSETTS

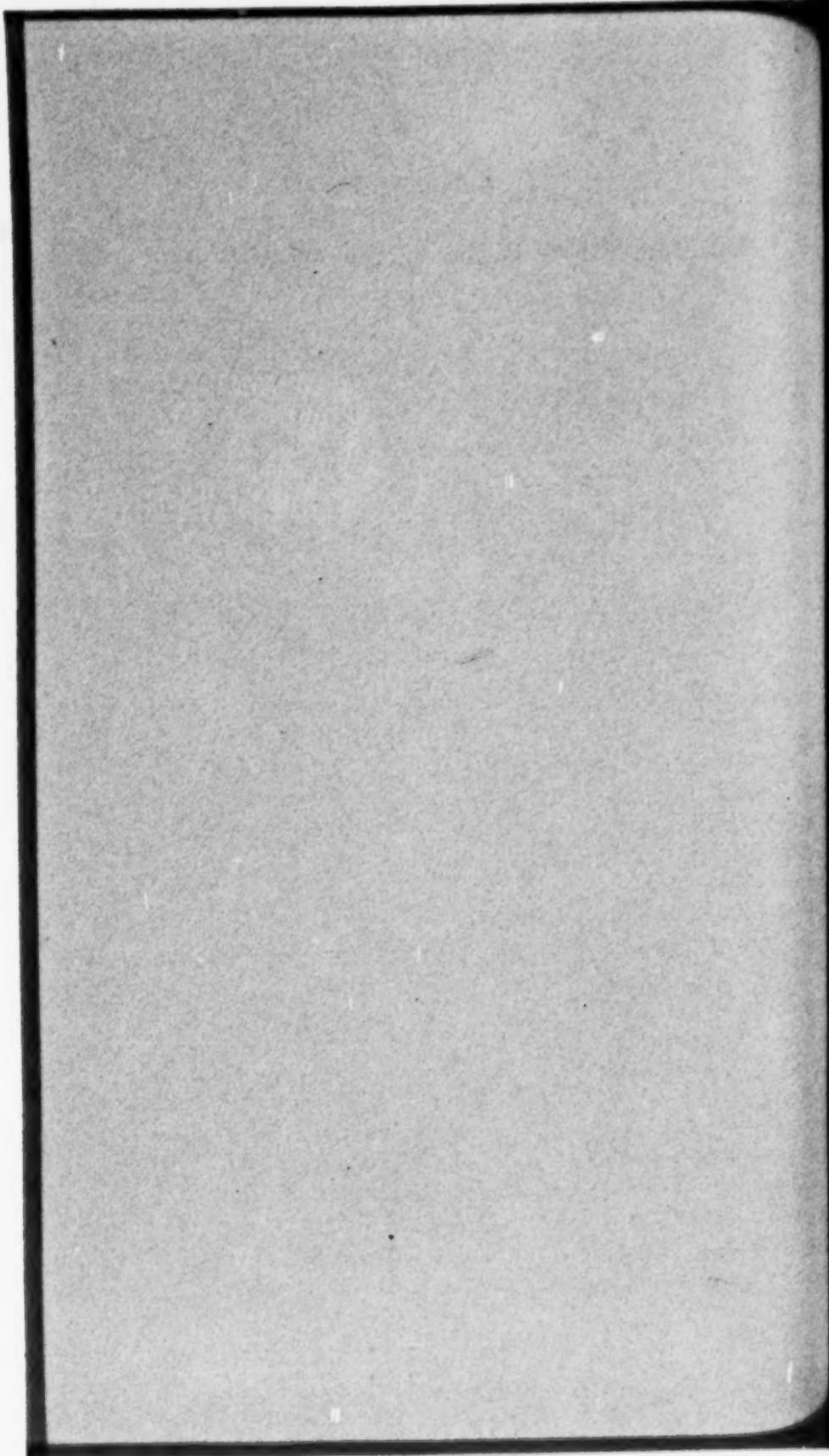
BRIEF OF DEFENDANT IN ERROR

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BOSTON

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1910



Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 75.

**FORE RIVER SHIPBUILDING COMPANY,
PLAINTIFF IN ERROR**

v.

SELMA T. HAGG.

BRIEF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action of tort brought in the Circuit Court of the United States for the District of Massachusetts by the defendant in error, Selma T. Hagg, a citizen of Sweden, hereinafter called the plaintiff, against the Fore River Shipbuilding Company, a Massachusetts corporation, hereinafter called the defendant, to recover damages under the Employers' Liability Act of Massachusetts (R. L., c. 106, sec. 73) for the death, without conscious suffering, of her husband, Charles A. Hagg, an employee of said company, resulting from an accident which occurred in the defendant's forge shop in Quincy, Massachusetts. The action was tried before a jury, and a verdict for the plaintiff was returned (Record, p. 8) on which judgment has been entered (Record, p. 9).

Prior to filing its answer the defendant moved that the plaintiff's writ be dismissed on the ground that the court was without jurisdiction because the Massachusetts statute under which this suit was brought is penal in

character (Record, p. 6). This motion was denied by Lowell, J., and the defendant excepted (Record, p. 7). After final judgment the defendant sued out a writ of error to this Court, assigning as error that "the court erred in overruling the defendant's motion to dismiss" (Record, p. 10).

The sole question reserved for this Court, therefore, is the question of jurisdiction raised by the defendant's motion to dismiss, namely,

"Whether or not the statute under which the plaintiff's action was brought was of such a penal character that the Circuit Court did not have jurisdiction of said action." (See certificate of circuit judge, Record, p. 9.)

The material portions of the statute are as follows:—

R. L., c. 106, sections 71 to 75, inclusive:—

Liability of Employers to Employees.

Section 71. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of:

First, a defect in the condition of the ways, works or machinery . . . : or,

Second, The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence . . . : or,

Third, The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad; the employee, or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer. . . .

Section 72 (as amended by Statutes 1906, c. 370). If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal represen-

tatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury; and in the same action under a separate count at common law, may recover damages for conscious suffering resulting from the same injury.

Section 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

Section 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars.

Section 75. No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty

days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing. . . .

The defendant corporation contends that section 73 of this statute, under which the suit at bar was brought, is so penal in character that the federal courts cannot take jurisdiction of actions brought under it.

BRIEF OF ARGUMENT.

The only language of the statute which can be urged in support of such a contention is the provision that the damages "shall be assessed with reference to the degree of culpability" of the defendant (section 74). Other death statutes of Massachusetts which have additional provisions of a penal nature besides the one quoted above have sometimes been characterized as penal, and sometimes as remedial in nature by the Supreme Judicial Court of the Commonwealth. For the purpose of determining its jurisdiction, however, a federal court must decide for itself, uncontrolled by local decisions, whether the statute is penal in the strict sense, as that term has been defined by the decisions of this Court. The well-established distinction seems to be that a strictly penal statute treats the wrong done as primarily an offence against the public, which the chief executive may pardon, and for which the state inflicts punishment upon the offender for the benefit of the public generally rather than of the injured person in particular; the purpose of such a statute is punishment. A remedial statute, on the other hand, treats the wrong done as primarily a wrong to an individual for which the legislature affords him a remedy in the form of compensation; the purpose of such a statute is compensation.

Huntington v. Attrill, 146 U. S. 657, 667, 668.
673, 683.

Huntington v. Attrill, 1893 Appeal Cases, 150.

The statute in question is not penal as thus defined. The death statutes of other states have uniformly been held by this Court not to be penal statutes.

Dennick v. R.R. Co., 103 U. S. 11.

Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593.

Northern Pacific R.R. Co. v. Babcock, 154 U. S. 190.

Stewart v. B. & O. R.R. Co., 168 U. S. 445.

The Massachusetts death statute applicable to railroads, which also provides for the assessment of damages with reference to the degree of culpability of the defendant, has been held not a penal statute by the Circuit Court of Appeals for the First Circuit.

B. & M. R.R. v. Hurd, 108 Fed. 116.

And the Act under which the suit at bar was brought has been held not penal by the Circuit Court for the district of Massachusetts.

Malloy v. American Hide & Leather Co., 148 Fed. 482. (Lowell, J.)

POINTS AND AUTHORITIES.

I.

HISTORY OF MASSACHUSETTS DEATH STATUTES.

In Massachusetts there was, at common law, no liability for negligently causing death. There are, however, five statutes authorizing recovery for death caused by negligence which have been so construed that together they have been said to constitute a harmonious legal system; and an examination of them all is helpful to an understanding of any one.

Brooks, adm. v. Fitchburg & Leominster St. Ry. Co., 200 Mass. 8.

1.

DEATH CAUSED BY DEFECTS IN HIGHWAYS.

The first statute giving damages for death was passed in 1648 or 1651, and has continuously been a part of the Massachusetts statute law since that time.

The Charters and General Laws of the Colony and Province of Massachusetts Bay, p. 55, ch. 16, sec. 2 (1648 or 1651): "The court considering the great danger that persons, horses, teams, are exposed to, by reason of defective bridges, and country highways in this jurisdiction: Doth order and declare, that if any person at any time, lose his life, in passing any such bridge or highway, after due warning given unto any of the selectmen of the town in which such defect is, in writing under the hand of two witnesses, or upon presentment to the shire court, of such defective ways or bridges, that then the county or town which ought to secure such ways or bridges, shall pay a fine of one hundred pounds to the parents, husband, wife or children, or next of kin to the party deceased."

See also the Statute of 1693, Ane. Char. of Mass., p. 269, c. 23, sec. 4; 1 Prov. Laws, c. 6, sec. 6.

In 1786 it was re-enacted as follows:—

St. 1786, c. 81, s. 7: "And if the life of any person shall be lost through the deficiency of the way, cause-way, or bridge, or for want of rails on any bridge, the county, town, or persons, who are by law obliged to repair and amend the same, shall be liable to be amerced in one hundred pounds, to be paid to the executor or administrator of the deceased, for the use of the heirs, devisees or creditors, upon a conviction before the court . . . on a presentment or indictment."

The Revised Statutes of 1836 (c. 25, s. 21) use the following words: "Shall be liable to a fine of one thousand dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person for the benefit of his heirs, devisees or creditors."

St. 1881, c. 199, s. 4, gives an additional remedy in tort for damages not exceeding \$1,000 to be assessed with reference to the degree of culpability of said town, to be recovered by the executor or administrator for the use of the widow and children in equal moieties; or, if there are no children, to the use of the widow, or, if there is no widow, to the use of the next of kin.

In the revision of 1882, the remedy by indictment was omitted (Pub. St., c. 52, s. 17). The statute is now found in *R. L., c. 51, s. 17.*

2.

LIABILITY OF RAILROADS AND STREET RAILWAYS FOR CAUSING DEATH OF PASSENGERS OR OTHER PERSONS, AND, IN CASE OF RAILROADS ALONE, OF EMPLOYEES.

The second death statute in Massachusetts was—

St. 1840, c. 80: “If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any rail-road, steam-boat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors and common carriers, shall be liable to a fine not exceeding \$5000, nor less than \$500, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole to the widow, and if no widow, to the heirs according to the law regulating the distribution of intestate personal estate among heirs.”

By *St. 1853, c. 414*, railroad corporations were made liable to indictment for causing the loss of life of any person in the exercise of due care, other than passengers and employees. The ground of liability, the measure of

recovery, and the persons benefited were the same as in the prior statute, but the time for bringing action was limited to one year.

In the Revision of 1860 (Gen. St.), the provisions of these two statutes regarding railroads are placed by themselves in chapter 63, section 97 thereof relating to passengers, and section 98 to persons other than passengers; while the provisions of these statutes affecting other common carriers are contained in Chapter 160, section 34. Thereafter railroads were treated differently from other kinds of common carriers.

St. 1874, c. 372, s. 163, consolidates these statutes relating to railroads and adds a section (section 164) providing for liability for causing death at a crossing.

The first statute relating expressly to street railways was St. 1864, c. 239, secs. 37 and 38. It is similar to the statute relating to railroads except in the following particulars. It omits the word "gross" in defining the negligence of servants for which liability is imposed; it applies both to passengers and to all others except employees; it requires the plaintiff in all cases to be in the exercise of due care; it uses the words "the corporation shall be punished by a fine"; the money is to be recovered in the same way and to go to the same persons.

By *St. 1881, c. 199*, a new and additional remedy was given in case of railroads, all other common carriers except railways, and in the case of defective highways, namely, an action of tort by the executor or administrator for the benefit of the same parties as before. The amount of liability is the same as before; the terms used are "the corporation shall be liable in damages," and for the first time the provision is inserted that the damages are "to be assessed with reference to the degree of culpability of said corporation or of its servants or agents."

The statutes regarding railroads and railways were combined in the revision of 1882 (Pub. Stat.) in chapter 112, section 212.

The remedy in tort was not given in case of street

railways until St. 1886, c. 140. Thereafter both remedies existed in the case of railroads and street railways. The remedy by indictment in all other cases was omitted from the Public Statutes (1882). St. 1883, c. 243, gives a similar action in tort for causing the death of employees of railroads. These provisions were later re-enacted in R. L., c. 111, sec. 267, St. 1906, c. 463, pt. I., sec. 63; and in St. 1907, c. 392, which is as follows:—

"If a corporation which operates a railroad or street railway, by reason of its negligence or by reason of the unfitness or negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, *it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars which shall be recovered by an indictment* prosecuted within one year after the time of the injury which caused the death, and shall be paid to the executor or administrator, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, *which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents,* and shall be recovered in an *action of tort*, begun within one year after the injury which caused the death, by the executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the sum of not less

than five hundred nor more than five thousand dollars, in the same manner as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by the provisions of this section."

3.

LIABILITY OF OTHER COMMON CARRIERS FOR CAUSING THE
DEATH OF PASSENGERS.

St. 1840, c. 80, Gen. Stat., c. 160, sec. 34, and St. 1881, c. 199, have been referred to. As re-enacted in Pub. St., c. 73, sec. 6, the remedy by indictment was omitted and only the remedy in tort was given. It is now found in R. L., c. 70, sec. 6, as follows:—

"If the proprietor of a steamboat or stage coach or a common carrier of passengers, except a railroad corporation or street railway company, by reason of his or its negligence, or by reason of the unfitness or gross negligence or carelessness of his or its servants or agents, causes the death of a passenger, he or it shall be *liable in damages* in the sum of not less than five hundred nor more than five thousand dollars which shall be *assessed with reference to the degree of culpability* of the proprietor or common carrier liable, or of his or its servants or agents, and shall be recovered in an *action of tort*, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin."

4.

EMPLOYERS' LIABILITY.*Liability of all persons for causing death of employees.*

The first statute giving a remedy for causing the death of an employee was St. 1883, sec. 243, and applied to railroads alone. It imposed upon railroads liability for causing the death of an employee under such circumstances as would have entitled the deceased to maintain an action against the railroad company if death had not resulted, under the same conditions and with the same remedies as if the deceased had not been an employee.

The first general statute on the subject was St. 1887, c. 270, and was entitled "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees in their service." Section 1 enlarges the common law liability of employers to employees for suffering and loss sustained by them through injuries received in the course of their employment, and provides that such liability should survive to the employee's personal representatives.

Section 2 gives an action for death, to the widow or dependent next of kin under similar circumstances, in case the employee is instantly killed or dies without conscious suffering.

Section 3 limits the amount of compensation in cases of personal injury to \$4,000:—

"In case of death, compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

The same notice and time for beginning action are prescribed whether the action is for simple injury or for death.

This statute did not give an action for death where

the death was preceded by conscious suffering, but simply provided that in such case the action for suffering should survive. (See *Ramsdell v. N. Y. & N. E. R.R. Co.*, 151 Mass. 245.)

St. 1892, c. 260, gave damages for the death in addition to those for the conscious suffering in such cases. The statute as re-enacted in 1902 and amended down to the time of the accident in the case at bar has already been quoted (*supra*, p. 2).

5.

**LIABILITY OF ALL OTHER PERSONS AND CORPORATIONS
FOR CAUSING DEATH.**

St. 1897, c. 416, created liability for causing death, on the part of corporations operating gas or electric light plants or systems.

St. 1898, c. 565, extended similar liability to any person or corporation. As re-enacted in 1902, it is as follows:

R. L., c. 171, s. 2: "If a person or corporation by his or its negligence, or by the gross negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be *liable in damages* in the sum of not less than five hundred nor more than five thousand dollars to be *assessed with reference to the degree of his or its culpability* or of that of his or its agents or servants, to be recovered in an *action of tort*, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin."

Lord Campbell's Act, to which reference is often made, was passed in 1846 (9 & 10 Viet., c. 93). The English Employer's Liability Act was passed in 1880 (43 & 44 Viet., c. 42).

II.

INTERPRETATION OF THESE STATUTES BY THE MASSACHUSETTS SUPREME COURT.

There are some cases in Massachusetts in which the statutes creating liability of railroads and street railways for causing death have been called penal statutes.

The first case was *Carey v. The Berkshire R.R. Co.*, 1 *Cush.* 475. This was an action, not under any statute, but at common law, and it was held that at common law a widow could not recover damages for the death of her husband caused by the defendant's negligence. The court took occasion, however, to discuss the statute of 1840, c. 80, which did not provide how the amount of the fine should be determined, and said,—

“As this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased.”

It should be noted that this statute uses the words “shall be liable to a fine”; that liability was not made dependent upon the due care of the deceased; that the fine was to be recovered only by indictment; and that it was to be recovered and paid over to the designated persons even if they were not near relatives of or dependent on the deceased, and were not therefore damaged by his death.

The method of determining the amount of recovery thus laid down by the court and employed during the next thirty years, while the sole remedy was by indictment, was expressly adopted by legislative enactment when the new remedy in tort was given in 1881.

Subsequent cases such as

Com. v. Boston & Lowell R.R. Co., 134 Mass. 211, 213,

- Littlejohn, adm. v. Fitchburg R.R. Co.*, 148 Mass. 478, 482,
Doyle, adm. v. Fitchburg R.R. Co., 162 Mass. 66, 71,
Hudson, adm. v. Lynn & Boston R.R. Co., 185 Mass. 510,

were all brought under the railroad and railway statutes, which grew out of the statute of 1840 and are all based upon *Carey v. Berkshire R.R. Co.*, *supra*.

In the following cases, language has been used showing that these statutes were not regarded as purely penal.

Com. v. Metropolitan R.R. Co., 107 Mass. 236, 237. The court says of the Street Railway statute that

"the purpose is to secure to the relatives some compensation for the loss to them, as well as to inflict some punishment for the offence."

Com. v. B. & A. R.R. Co., 121 Mass. 36, 37. An indictment under the railroad statute (Gen. Stat., c. 63, s. 98). As the deceased left no widow or children, it was held that the action would not lie. The court said,—

"A leading object of them [the death statutes] is to secure some pecuniary provision for those who may be dependent upon the deceased, and while penal in form, they are therefore largely remedial in character."

In *Kelley, adm. v. Boston & Maine R.R.*, 135 Mass. 448, brought under the railroad statute, the court points out that the new statute of 1881 giving a remedy in tort did not transfer jurisdiction from the criminal to the civil court, but its purpose was to give a new remedy to the party by a civil action, in addition to that already existing by indictment and differing from it in important particulars. The remedy by indictment is not available as a matter of right, but is dependent upon the action of the grand jury, to be enforced by or under the direction of a public officer and according to the forms of criminal

proceedings. The civil action, on the other hand, may be instituted by the executor or administrator of his own motion; trial will be without a jury unless one is demanded; in case of trial by jury the damages are assessed by the jury instead of by the judge, as in the criminal proceeding; the burden of proof will be sustained by proving the issue by a preponderance of evidence; and the losing party will be liable to costs. The court held that the statute was therefore merely prospective in its operation and did not apply to rights already accrued.

If the statute of 1881, *supra*, had been a remedial statute, relating merely to the form of procedure by which existing rights were to be enforced, it would have applied to rights already accrued.

Howard, admx. v. Fall River Iron Works Co.,
203 Mass. 273, 276.

Dietrich, adm. v. Northampton, 138 Mass. 14, was an action under the defective highway death statute (Pub. St., c. 52, sec. 17). Mr. Justice Holmes, speaking for the court, questions whether the rule for determining criminal liability for causing the premature birth and death of a child could be relied upon by analogy for determining civil liability for causing death under this statute. The test laid down is whether the child, if it had survived, could have maintained an action for the injuries.

In *Daly v. N. J. Steel & Iron Co.*, 155 Mass. 1, brought under the employers' liability statute for causing instant death, the court says (page 4):—

"But the statute was designed to extend the liability of employers for personal injuries suffered by employees in their service, and the requirements as to notice should receive a liberal construction."

It was held that the action should be brought in the name of such next of kin only as were dependent upon the deceased for support.

In *Higgins v. Central N. E. & W. R.R. Co.*, 155 Mass. 176, 180, the Massachusetts court took jurisdiction of an action under a Connecticut statute giving damages for death, the court holding that the statute was not contrary to Massachusetts public policy.

"Our own statutes have, in several instances, changed the policy of the common law, so as to allow damages for death occasioned by negligence."

citing the highway statute, the common carrier statute, the railroad and street railway statute, and the employers' liability statute.

In *Brooks, adm. v. Fitchburg & L. St. Ry. Co.*, 200 Mass. 8, 15, 16, in a very complete history of the death statutes of Massachusetts, they are spoken of as being remedial and as imposing civil liabilities.

See also *Oulighan, adm. v. Butler*, 189 Mass. 287, 290.

III.

THE DEATH SECTION OF THE EMPLOYERS' LIABILITY STATUTE IS NOT PENAL IN NATURE.

Although it has been said that these various statutes constitute a uniform system, in the sense that they are mutually exclusive (*Oulighan, adm. v. Butler*, 189 Mass. 287) and certain provisions are similar in all the statutes, nevertheless they differ in some important respects. Whatever elements of a penal or of a non-penal nature may be found in the railroad and railway statutes, the death section of the employers' liability statute is essentially non-penal and civil in its character.

1. It is, and always has been, part of a statute the primary purpose of which, as shown by its title and its context, was to extend the common law liability of employers for negligently causing injury to employees,—a purely civil liability. (*McRae v. N. Y., N. H. & H. R.R. Co.*, 199 Mass. 418, 419.) It is under the first section of the statute indeed that the greater number of actions

have been brought. It was manifestly fair and right that, if an employer was liable for causing an injury to his employee, he should not escape liability if under the same circumstances the injury was so much more serious that instant death resulted, and recovery was therefore permitted "in the same manner and to the same extent . . . as if the deceased had consciously suffered" (St. 1887, c. 270, sec. 2). This seems to have been the reason for the enactment of Section 2 of the Statute of 1887 (now Section 73). It then became apparent that in fairness the same liability should exist for causing death preceded by suffering as for causing instant death; and consequently the Statute of 1892, c. 260, was passed (now Section 72).

2. The statute has never used the word "fine" or "punished" or "penalty" as have the highway, railroad, and carrier statutes, but instead uses the words "a right of action for damages" and "damages for the death"; and also in its original form the words "compensation in lieu thereof" and "compensation for injury or death" (St. 1887, c. 270, sec. 3).

3. This statute differs from all the other death statutes in this, namely, that the others give damages for the death, when there are no widow or children, to the heirs or next of kin (without limitations); while this statute gives damages only to the widow or to such next of kin as were dependent upon the deceased's wages for support, who were therefore directly, financially, injured by the defendant's wrong-doing. Unless there is either a widow or next of kin who are dependent upon the deceased for support, there is no liability for causing the death.

*Bartley, adm. v. B. & N. St. Ry. Co., 198 Mass.
163.*

If the primary purpose of the statute was punishment, this provision would be absurd. It is obviously as culpable for an employer to cause his employee's death

by negligence, if the latter has no dependent relatives, as it is if he is well provided with them.

4. By the express provisions of the statute the defendant is liable for his negligence only if the deceased was himself in the exercise of due care, exactly as in actions of tort for negligence at common law. This is inconsistent with the view that the statute was intended as a penalty or punishment of the defendant for negligently destroying human life, because the defendant's culpability might be equally great whether or not the deceased was negligent. Contributory negligence on the part of the injured party is no defence to an indictment for manslaughter by negligence. This provision also distinguishes this statute from the railroad and carrier statutes applicable to passengers (*supra*) under which contributory negligence is no defence.

Merrill, admx. v. Eastern R.R. Co., 139 Mass. 252, 257.

5. Under the Employers' Liability Act damages were never recoverable by indictment, as in the other statutes which the Massachusetts Supreme Court has called penal, but only by an action of tort.

6. It appears, by the provisions of the statute, that the action is precisely the same whether brought for suffering or for death. The same notice must be given; there is the same limit of time for beginning action; the same standards of negligence and due care apply; everything is the same except the measure of damages.

7. Although there are cases under the railway and railroad statutes in which it has been held that a more strict rule as to proving the due care of the deceased (*Hudson, adm. v. Lynn & Boston R.R. Co.*, 185 Mass. 510, 520. Cf. *Black v. N. Y., N. H. & H. R.R. Co.*, 193 Mass. 448, 453) or the negligence of the defendant (*Littlejohn, adm. v. Fitchburg R.R. Co.*, 148 Mass. 478, 482) applies than in civil cases, nevertheless it has generally been held under these other statutes, and always, we believe, under

the employers' liability statute, that the same rules apply as in ordinary civil actions on the case for tort for determining the efficient cause of the accident (see *Oulighan, adm. v. Butler*, 189 Mass. 287, 292) and for establishing the defendant's negligence and the due care of the deceased (*Beale, adm. v. Old Colony St. Ry. Co.*, 196 Mass. 119, 123; *Prince, admx. v. Lowell Electric Light Corp'n*, 201 Mass. 276, 281). The plaintiff need prove his case by a fair preponderance of the evidence only, and not beyond a reasonable doubt.

8. An argument advanced in the case of *Carey v. Berkshire R.R. Co.*, supra, for holding the statute of 1840 (*supra*) penal, namely, that the statute was limited to certain enumerated classes of carriers, no longer applies, for the five statutes now cover all classes of carriers and all other persons and corporations, and they apply to negligence in the performance of contractual as well as of non-contractual obligations.

Sherlag v. Kelley, 200 Mass. 232.

9. Although the other four death statutes are copied more or less closely from the old colonial statute and the statute of 1840, and are thus perhaps peculiar to Massachusetts, Maine, and New Hampshire, the employers' liability statute was copied largely from the English Employer's Liability Act, passed in 1880 (43 & 44 Vict., c. 42), and is in most respects similar to that of the other states which have, so far as we have discovered, uniformly been held not to be penal in nature.

10. Attention should be called especially to Section 72 of this statute, giving damages for death preceded by conscious suffering. Would an action under this section be penal or non-penal? For the portion of the damages awarded for suffering the action is in every respect identical with an action under Section 71, which no one would claim is penal. Yet for the portion of the damages awarded for the death the action is just as penal as an action under Section 73.

11. If this were a penal statute, then it would be no defence that the intestate either expressly or impliedly assumed the risk (*Com. v. Vt. & Mass. R.R. Co.*, 108 Mass. 7; *Dayle, adm. v. Fitchburg R.R.*, 162 Mass. 66), yet assumption of risk is held to be a defence under the death section of this statute (Section 73) as well as under the personal injury section (Section 71).

Houlihan v. Conn. River R.R. Co., 164 Mass. 555, 557.

Morena v. Winston, 194 Mass. 378, 383, 385.
Bartley, adm. v. B. & N. St. Ry. Co., 198 Mass. 163, 170, 171.

Howard, admx. v. Fall River Iron Works Co., 203 Mass. 273, 275.

"Unless the decedent if he had survived could have maintained an action, the plaintiff cannot recover."

Skinner v. B. & M. R.R., 200 Mass. 422.

12. The only feature of this employers' liability statute which at all resembles a penalty is the provision that damages for the death "shall be assessed with reference to the degree of culpability" of the defendant. We submit that this is not sufficient, in view of all the other facts enumerated above, to make the statute so penal that it cannot be enforced in other jurisdictions.

To measure adequately the damage suffered by death is difficult. Up to the moment of death the damages are measured by the suffering and loss of the injured person. From that moment on another measure must be sought. As the money is to go to the widow or next of kin, some states have adopted their suffering and loss as the measure of the damages to be recovered. There are many objections to such a plan. In many cases the loss to widow or dependent relative would be immeasurably great; in other cases the death might actually

be a benefit. It depends upon so many circumstances, fortuitous so far as the obligations of the employer to the employee are concerned, that its operation would seem unfair. Moreover, the attempt to measure in money the value of one human life to another would be likely to arouse unduly the sympathy of a jury and make the verdict unfair to employer. Even where, as in Maine, the compensation recoverable is limited to the pecuniary injuries to the widow and heirs resulting from the death, the Supreme Court has said,—

“It is evident that the pecuniary damages to be recovered under the statute can never be ascertained with exactness nor with any satisfactory degree of approximation.”

McKay, adm. v. N. E. Dredging Co., 92 Maine, 454, 459.

The provision adopted in Massachusetts seems therefore as satisfactory a way as any of solving the difficulty. It does not attempt the unpleasant and really impossible task of measuring the value of a life, but it does give substantial compensation, and, that this may also be just to the defendant, it measures it by the defendant's culpability. The damages are fixed in this way because of the difficulty of fixing them in any other way. As was said by Mr. Justice Knowlton in *Ramsdell v. N. Y. & N. E. R.R. Co.*, 151 Mass. 245, 249,—

“The expression ‘compensation in lieu thereof’ does not very aptly characterize the recovery authorized; for there is no mode of estimating ‘compensation’ for the death of a man.” . . .

It is equally true of many other actions which are purely remedial and civil that the damages awarded are not supposed to be measured by or the equivalent of the injury sustained, namely, actions for double or triple damages or for punitive damages.

The statute does not forbid an act and impose a

penalty for its violation to be recovered by and for the benefit of the state. It treats of an act which was a wrong at common law, but for which no civil remedy had previously existed, and its chief purpose is to give a remedy to the persons who suffer most from the wrong. It treats the wrong done as a wrong to the individual rather than to the state whose laws are broken. Both the right of action and the damages recovered are given to the injured persons as compensation for the wrong done them. In common with all civil actions of tort it results incidentally in punishing the wrong-doer; and, although this statute makes the burden heaviest when the wrong-doer is most culpable, it nevertheless remains true that its main purpose and effect is to afford to the persons injured a private remedy for the recovery of compensation for the damages caused directly by the wrongful act.

IV.

WHAT STATUTES FOREIGN JURISDICTIONS WILL REFUSE TO ENFORCE.

In *Howarth v. Lombard*, 175 Mass. 570, 572, Knowlton, J., says:—

"It is familiar law that statutes do not extend *ex proprio vigore* beyond the boundaries of the State in which they are enacted. If they are merely penal, they cannot be enforced in another State. If they furnish merely a local remedy for the invasion of a recognized right which is protected elsewhere in other ways, they cannot be given effect in another jurisdiction. *Richardson v. New York Central Railroad*, 98 Mass. 85, 89. The fundamental question is whether there is a substantive right originating in one State and a corresponding liability which follows the person against whom it is sought to be enforced into another State. Such a right, arising under the common law, is enforceable everywhere. Such a right arising under a local statute, will be enforced *ex comitate* in another State, unless there is a good reason for refusing to enforce

it. It will be enforced not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him. If the statute creating the right is against the policy of the law of the neighboring State, that is a sufficient reason for refusing to enforce the right there. In the neighboring State, in such a case, it will not be considered a right. If the enforcement of a statutory right in a neighboring State in the manner proposed will work injustice to its citizens, considerations of comity do not require the recognition of it by the courts of that State. If the right by the terms of the statute creating it is to be enforced by prescribed proceedings within the State, the right is limited by the statute, and can only be enforced in accordance with the statute. If it is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere. But if there is a substantive right of a kind which is generally recognized, courts through comity ought to regard it, and enforce it as well when it arises under a statute of another State as when it arises at common law, unless there is some good reason for disregarding it."

'Under this doctrine the decisions of the state courts as to enforcing death statutes of other states have been conflicting, in determining whether there was good reason for refusing to enforce the foreign statute. The courts have examined minutely the differences between the foreign statute sought to be enforced and the death statute of the home state, and the decisions have varied much as to the amount of such difference which would justify the court in refusing to take jurisdiction.

As against this varied and uncertain doctrine, this Court early adopted the policy of enforcing, in a case properly brought before it, any right given by a statute of a state unless the statute was penal in the strict and primary sense (*Dennick v. R.R. Co.*, 103 U. S. 11, *infra*). Probably exception would be made in case such foreign statute would, in the opinion of the court, work injustice to its citizens or in case its forms of procedure were

not adapted to the enforcing of the rights given (*Slater v. Mexican National R.R. Co.*, 194 U. S. 120, *infra*; *Atchison, Topeka and Santa Fé Ry. Co. v. Sowers*, 213 U. S. 55, 67).

The whole tendency of recent decisions in the state courts has been to adopt this Federal doctrine until now it is undoubtedly the prevailing rule in the state courts, although some contrary decisions may still be found. This tendency is well illustrated by the decisions of the Massachusetts court:—

In *Richardson, admx. v. N. Y. Central R.R. Co.*, 98 Mass. 85, the court refused to take jurisdiction of an action brought under a New York death statute. The decision was criticised by this Court in *Dennick v. R.R. Co.*, 103 U. S. 11, 21.

In *Davis, admx. v. N. H. & N. E. R.R. Co.*, 143 Mass. 301, and *Higgins v. Central N. E. & W. R.R. Co.*, 155 Mass. 176 the court gradually departed from its former doctrine; and in *Walsh, adm. v. B. & M. R.R. Co.*, 201 Mass. 527, 533, it squarely overruled its former decision and took jurisdiction of an action brought under the New York death statute. The court said:

"The tendencies of the later decisions have also been towards a broader comity in the enforcement of rights created by the legislation of sister States." "The case of *Richardson v. N. Y. C. R.R.* has been materially modified, if not overruled, by the decision in *Higgins v. C. N. E. & W. R.R. Co.* . . . in conformity with the more liberal practice that now prevails."

Story, Conflict of Laws (8th ed.), § 625, note a: "Whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one and not opposed to the interests of the state."

The only test, therefore, is whether the statute sought to be enforced is strictly penal; not whether in some aspects it may properly be called penal, but whether it is so thoroughly penal in its nature that it cannot with propriety or justice be enforced in the courts of another jurisdiction. In other words, is it penal in the international sense?

V.

**WHAT IS A PENAL STATUTE WITHIN THE MEANING OF
THE RULE, "THE COURTS OF NO COUNTRY EXECUTE
THE PENAL LAWS OF ANOTHER"?**

This question has been fully considered and settled by this Court in the case of *Huntington v. Attrill*, 146 U. S. 657.

This was a suit brought in Maryland to enforce a judgment recovered in New York under a New York statute which made officers of a corporation liable for all of its debts if they signed a false certificate of the amount of its capital stock. The New York courts had held in many cases that this statute was penal because it imposed a burdensome liability on the officers as a penalty for their wrongful act, that the statute must therefore be strictly construed, and that it was penal within the terms of the statute of limitations. The Maryland court declined jurisdiction on this ground. This Court overruled the decision of the Maryland court, holding that the statute was not penal in the international sense, and that the Maryland court ought therefore to have taken jurisdiction under the full faith and credit clause of the constitution. It was said that *strictly and primarily the words "penal" and "penalty" denote punishment whether corporal or pecuniary, imposed and enforced by a state for a crime or offence against its laws. Penal laws are laws imposing punishment for offences committed against the state and which under the English and American constitutions the executive has power to pardon.* In a more general and loose sense the words are sometimes used to denote any extraordinary liability to which the law subjects a wrong-doer in favor of the person wronged, not limited to the damages suffered (page 667); *it is only statutes that are penal in the strict and primary sense, however, which other jurisdictions will not enforce.* The test whether a law is penal, in the strict and primary sense, is

whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual (page 668).

"In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done, but such is not the law of this court. By our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought" (page 670).

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act" (page 673).

"That decision [*Dennick v. Railroad Co.*, 103 U. S. 11] is important as establishing two points: 1st. The court considered 'criminal laws,' that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extra-territorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States" (page 674). "The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person." "If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions" (page 683).

The distinction between the international meaning, so called, of the word "penal" and the common and broader meaning of the term is shown by the fact that the same statute which in the case of *Huntington v. Attrill*, *supra*, this Court held not penal in the international sense, was in the earlier case of *Chase v. Curtis*, 113 U. S. 452, and again in the later case of *Park Bank v. Remsen*, 158 U. S. 337, held by the same court to be penal in the more general sense and therefore to be construed with strictness as against those sought to be subjected to its liabilities.

Huntington v. Attrill, 1893 *Appeal Cases*, 150, was an action in an Ontario court upon the judgment of a New York court, under the same statute which gave rise to the case of *Huntington v. Attrill*, in the U. S. Supreme Court, *supra*. The lower court dismissed the action on the ground that the statute had been held penal in New York. On appeal it was held by the Privy Council that the courts of Ontario are not bound by the opinion of the New York courts on the question whether the statute is penal in such sense as to oust their jurisdiction. The court appealed to must in each case determine for itself whether the enforcement of the right would directly or indirectly involve the execution of the penal laws of another state. A statute is penal in this narrow sense only when the penalty is recoverable at the instance of the state or of a member of the public in the character of a common informer. Such statutes are limited to breaches of the public law which are made punishable at the instance of the state government or of some one representing the public. The object of a penal action always is the enforcement by the State, directly or indirectly, of punishment.

Similar statutes of other states have frequently been held penal in the sense that they are to be strictly construed. *Steam Engine Co. v. Hubbard*, 101 U. S. 188. Yet they have uniformly been held by this Court not to be penal in the international sense so as to prevent suits

being brought under them in the United States courts. *Whitman v. Oxford National Bank*, 176 U. S. 559, 567.

Leyner Engineering Works v. Kempner, 163 Fed. 605, 607, was an action under a Colorado statute making officers of a foreign corporation liable on contracts made within the state before complying with certain regulations. It was held that whether a statute of one state which in some aspects may be called penal is a penal law in the international sense so that it cannot be enforced in the courts of another state depends upon the question whether its purpose is to punish an offence against the public justice of the state or to afford a private remedy to the person injured by the wrongful act. The test is not by what name the statute is designated by the legislature or the courts of the state by which it was enacted, but whether it appears to the tribunal which is called upon to enforce it to be, in its character and effect, a punishment of an offence against the public, or the granting of a civil right to a private person. The question therefore becomes one of jurisprudence which this court must determine, uncontrolled by local decisions. "This statute gives the plaintiff a civil right in aid of his demand, and the wrong, if any, was to an individual and not to the public, hence the statute while of a penal nature is not to be held a penal law in this jurisdiction, though the Supreme Court of Colorado holds to the contrary."

The distinction is well brought out in the case of

Wisconsin v. Pelican Insurance Company, 127 U. S. 265, 290, 299: This was a suit brought in the United States Supreme Court by the State of Wisconsin against a corporation organized under the laws of Louisiana, on a judgment recovered in a state court of Wisconsin under a Wisconsin statute which provided that, for failure to file a certain return, "such corporation . . . shall forfeit five hundred dollars, . . . for every month that such corporation shall continue thereafter to transact any insurance business in this State until such statement is filed." It was held that this court had no juris-

diction because the statute was in the strictest sense a penal statute. The cause of action was not any private injury, but wholly an offence committed against the state, violating her law. The prosecution was in the name of the state, and the whole penalty would accrue to the state. It is immaterial whether the prosecution is by indictment or by action. It is a pecuniary fine imposed by way of punishment for an offence.

In *Brady v. Daly*, 175 U. S. 148, 157, the statute construed makes any one who publicly performs, without the consent of the proprietor, a dramatic composition which has been copyrighted, liable for damages in such sum, not less than \$100, as to the court shall appear to be just. It was held that, as the statute gives damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him, it is not penal, even though it imposes a minimum amount of damages. The court says, "Although punishment, in a certain and very limited sense, may be the result of the statute . . . so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages . . . and the minimum amount appears . . . to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

The following cases also illustrate the distinction between penal and remedial statutes:—

In *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 397, the penalty clause (par. 7) of the Sherman Anti-trust Act, giving treble damages and attorney's fees to traders injured by such illegal combinations, was held not to be penal in the strict sense and not governed by the statute of limitations for penal actions.

In *LeForest v. Tolman*, 117 Mass. 109, and *Adams v. Palmer*, 6 Gray, 338, statutes giving double and treble damages were held not penal.

Yet it seems well settled that damages awarded in excess of fair compensation are in the nature of pen-

alties imposed by way of punishment for a violation of statutory requirements.

Missouri Pacific R'y Co. v. Humes, 115 U. S. 512, 522.

Minneapolis & St. L. R'y Co. v. Beckwith, 129 U. S. 26, 36.

In *Lees v. U. S.*, 150 U. S. 476, the act construed provides that any one importing foreign laborers under contract shall forfeit and pay \$1,000 to be sued for and recovered by the United States or by any person who shall first bring his action therefor, as debts of like amount are now recovered. This was held to be a criminal action, though civil in form.

In *U. S. v. Ill. Cent. R.R. Co.*, 156 Fed. 182, 185, a statute making it unlawful to operate a train without certain safety appliances and imposing a penalty of \$100 for each violation to be recovered by a suit was held to be penal because it makes an act unlawful, imposes a penalty which goes to the United States, and undoubtedly the United States might grant a pardon.

In *United Breweries Co. v. Colby*, 170 Fed. 1008, 1011, the statute forbade, under severe penalties, recoverable by the state on an indictment, the sale of liquor under certain conditions. Another section authorized the recovery by the purchaser of all payments made for the purchase of such liquor. The latter section was held to be remedial and not penal.

In *United States v. Nash*, 111 Fed. 525, a statute imposing a penalty for navigating a boat without a licensed engineer, one-half for the use of the informer, to be recovered by indictment, was held penal.

In *Atchison, T. & S. F. R'y Co. v. U. S.*, 172 Fed. 194, a statute imposing penalty on railroads for using ears without grab-irons, to be recovered by a suit brought by the United States, was held penal.

In *Wilson v. Head*, 184 Mass. 515, a statute giving a right to recover any payment made on a con-

tract to buy or sell stock on margin, when neither party had any intention of actually receiving or delivering the stock, was held not to be penal.

In *Iowa v. Chicago, Burlington & Quincy R.R. Co.*, 37 Fed. 497, it was held (Brewer, J.) that an action under an Iowa statute which provided that railroad corporations guilty of extortion should forfeit and pay the State of Iowa not less than \$1,000 nor more than \$5,000 to be recovered in a civil action by ordinary proceedings instituted in the name of the State, was a criminal action and could not be removed to the United States Courts.

While it is undoubtedly true that the construction placed upon a statute by the highest court of the state in which it was enacted is usually adopted by the United States courts, it is nevertheless settled that the United States courts will decide for themselves, independently of the opinion of the state courts, whether the statute is of such nature, penal or otherwise, that they can properly take jurisdiction of an action brought under it.

Huntington v. Attrill, 146 U. S. 657, 683 (*supra*).

Huntington v. Attrill, 1896 Appeal Cases, 150 (*supra*).

Bauserman v. Blunt, 147 U. S. 647.

Scott v. Neal, 154 U. S. 34, 45.

VI.

DEATH STATUTES OF OTHER STATES.

Decisions of the Federal Courts.

Death statutes of other states have come before this Court for construction, and in accordance with the principles already set forth have, in every case, been held not penal in the strict sense.

Dennick v. R.R. Co., 103 U. S. 11, 17, was a suit brought in a New York state court, but removed to the United States Circuit Court, by a New York

administrator of a New York citizen, killed by defendant's negligence in New Jersey. Suit was brought under a New Jersey statute which made the corporation liable "to an action for damages" brought by the personal representative of the deceased for the exclusive benefit of the widow and next of kin, to be distributed among them in the proportions provided by the law regarding intestate estates; the jury to give such damages as they should deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin.

The Supreme Court held, overruling the judgment of the lower court, that the United States courts might take jurisdiction; that, although a statutory remedy, this was a civil action to recover damages for personal injury; that the statute does not belong to the penal laws which can only be enforced by the state where the offense was committed.

Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 604, was a suit in the United States Circuit Court in Texas to recover damages for the death of the plaintiff's husband resulting from an accident occurring in Louisiana through the defendant's negligence. Suit was brought under a Louisiana statute which provided for the survival of actions for personal injury in favor of surviving minor children and the widow or of the father and mother, and that the survivors above mentioned may also recover the damages sustained by them by the death. It was held that the action would lie, inasmuch as the statute is not in substance inconsistent with the statutes or public policy of the State of Texas, and that the rule against enforcing the penal laws of another state does not apply to a statute of this kind, which merely authorized "a civil action to recover damages for a civil injury."

Northern Pacific R.R. Co. v. Babcock, 154 U. S. 190, was a suit brought in a Minnesota court and later removed to the United States Circuit Court for Minnesota, for death caused by defendant's negligence in Montana. Suit was brought under a

Montana statute which gave an action for damages to the heirs or personal representatives, such damages to be given as under all the circumstances of the case may be just. This Court held that the amount of damages recoverable was to be controlled by the statute of Montana and not that of Minnesota, that the Circuit Court rightly took jurisdiction, and quoted with approval a statement by the Minnesota court, that "to justify a court in refusing to enforce a right of action that accrued under the law of another State, because against the policy of our laws it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our citizens."

Stewart v. B. & O. R.R. Co., 168 U. S. 445, was a suit in the District of Columbia by an administrator appointed in the District for the death of his intestate who was killed in Maryland through the defendant's negligence. Suit was brought under a Maryland statute which gave an action for damages for the benefit of the wife, husband, parent, and child to be brought by and in the name of the State of Maryland, the jury to give such damages as they may think proportioned to the injury resulting from such death to the parties for whose benefit the action is brought and to be divided among them in such shares as the jury shall direct. The District of Columbia statute gave an action for damages for deaths caused in the District to the personal representative of the deceased, damages not to exceed \$10,000 and to be for the benefit of the family in accordance with the statute regulating the distribution of intestate property. The Supreme Court, reversing the decision of the Court of Appeals, held that the action would lie in spite of the differences in the two states in the party authorized to bring suit, the persons entitled to damages, and in the method of apportioning such damages. The case differs from those in which a penalty is imposed for an act in itself not wrongful. The purpose of the several statutes passed in the states, in more or less conformity to what is known as Lord Campbell's Act, is to provide for recovering the damages caused

by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local, but transitory, and can as a general rule be maintained wherever the wrong-doer can be found.

See cases cited in *Huntington v. Attrill*, 146 U. S. 657, at 675, *supra*.

In *Slater v. Mexican National R.R. Co.*, 194 U. S. 120, it was held that a Texas court rightly refused to take jurisdiction of an action under a Mexican death statute, because its court and method of procedure were not adapted properly to carry out the provisions of the Mexican statute which gave damages in the form of annual payments so long as the wife and dependents remained unmarried and the deceased, if alive, would have had to furnish them support.

See *Atchison, Topeka and Santa Fé Ry. Co. v. Sowers*, 213 U. S. 55, 67.

In *Brisenden v. Chamberlain*, 53 Fed. 307, an action under the South Carolina death statute was removed from a state to a federal court, and objections taken on the ground of jurisdiction were overruled.

In *Bigelow v. Nickerson*, 70 Fed. 113, the Wisconsin death statute was held not penal.

In *Evey v. Mexican Cent. R'y Co.*, 81 Fed. 294, the Mexican death statute was held not penal.

In *Clark v. Russell*, 97 Fed. 900 (Circ. Ct. of App.), an action was held remedial, not penal, brought under the Nebraska constitution making railroads liable irrespective of the company's negligence for all injuries inflicted upon passengers except when the injury arose from criminal negligence of the person injured or from the violation of some express regulation of the road.

See also *Missouri Pacific Ry. Co. v. Larussi*, 161 Fed. 66.

STATE COURTS.

Among the many cases which might be cited are:—

Stoeckman, adm. v. Terre Haute & Indianapolis R.R. Co., 15 Mo. App. 503. Action under Illinois death statute allowed in Missouri even though the corresponding Missouri statute had this penal element, that it awarded a fixed penalty of \$5,000, irrespective of the actual pecuniary loss.

Bruce's Adm. v. Cincinnati R.R. Co., 83 Ky. 174. Under the Tennessee employers' liability statute which gave punitive or vindictive damages.

Leonard, adm. v. The Columbia Steam Navigation Co., 84 N. Y. 48. Under Connecticut employers' liability statute.

Burns v. Grand Rapids & I. R. Co., 113 Indiana, 169.

Morris v. The Chicago, R. I. & P. Ry. Co., 65 Iowa, 727.

Knight v. West Jersey R.R. Co., 108 Penn. St. 250.

Walsh, adm. v. B. & M. R.R., 201 Mass. 527.

VII.

DECISIONS OF FEDERAL COURTS UPON THE MASSACHUSETTS DEATH STATUTES.

So far as we have been able to discover, the Supreme Court of the United States has never passed upon the question whether any of the Massachusetts death statutes, so called, are penal in the international sense. The death statute relating to railroads and other common carriers came before this Court in the case of *The Harrisburg*, 119 U. S. 199, 214, but the suit was dismissed for other reasons and the question of whether an action under it would lie in the United States courts was not considered.

The question has been raised several times in the lower courts.

Griffin v. Overman Wheel Co., 61 Fed. 568, was an action under the death section of the Employers' Liability Act. The case was tried in the Circuit Court and taken on error to the Circuit Court of Appeals, but the question of the jurisdiction of the court was not raised.

In the case of *Lyman v. B. & A. R.R. Co.*, 70 Fed. 409, the Railroad Statute, so called, came before the Circuit Court. Judge Carpenter held that the statute was penal, and could not be enforced by the United States courts.

Perkins v. B. & A. R.R. Co., 90 Fed. 321, was also an action in the Circuit Court under the Railroad Statute. Judge Putnam held that he was controlled by the decision in the last preceding case, though the opinion indicates some doubt in his mind as to the correctness of that decision. These two cases were subsequently overruled.

Vetaloro v. Perkins, 101 Fed. 393, was an action in the Circuit Court under the death section of the Employers' Liability Act. The court took jurisdiction, and the question whether the statute was penal was neither raised nor considered. Judge Colt held (page 397) that the purpose of the act was to remove a common law obstacle and to create a right of action for a common law tort, that the whole act was highly remedial, and that it had received and should continue to receive a liberal construction.

B. & M. R.R. v. Hurd, 108 Fed. 116. This was an action under the death section of the Railroad Statute, so called. The question of the jurisdiction of the court was raised, and the case was taken to the Circuit Court of Appeals, which court in a carefully considered opinion overruled the earlier cases of *Lyman v. B. & A. R.R.* and *Perkins v. B. & A. R.R.*, and held that the statute was not penal, and that an action under it would lie in the United States courts. It was said that it was quite apparent that the main purpose of the Massachusetts statute was compensation, although in form and in other respects it was penal; that under the liberal rules of the Supreme

Court it must be held remedial in the international sense. A petition for a writ of certiorari was denied by this Court (184 U. S. 700).

Malloy v. American Hide & Leather Co., 148 Fed. 482, was an action in the Circuit Court under the death section of the employers' liability statute. The defendant demurred on the ground that the statute was penal and could not be made the basis of an action in the federal courts. It was held by Judge Lowell, following the case of *B. & M. R.R. v. Hurd*, supra, that the statute was not penal in the international sense, and that the court should take jurisdiction.

B. & M. R.R. v. Hurd, supra, has been followed in two cases in which action has been brought in a United States court under a Massachusetts death statute.

McCabe v. American Woolen Co., 124 Fed. 283; 132 Fed. 1006.

N. Y. Central & H. R. R.R. Co. v. McGrath, 151 Fed. 436.

VIII.

IT HAS BEEN SAID THAT MAINE AND NEW HAMPSHIRE ARE THE ONLY OTHER STATES HAVING DEATH STATUTES SIMILAR TO THOSE OF MASSACHUSETTS.

Maine.

In 1821 a highway statute was passed almost identical in language with the Massachusetts Statute of 1786 (St. Maine 1821, c. 118, sec. 17). The words used were "shall be liable to be amerced in the sum of \$300 . . . upon a conviction on a presentment or indictment."

Pub. St. 1848, c. 70, sec. 2, provided that for causing loss of life the owners of steamboats or railroads under certain circumstances "shall forfeit not exceeding \$2000" to be paid to the administrator of the deceased for the use of his heirs to be recovered by indictment.

St. 1855, c. 161, extended the liability to all common carriers, used the terms "shall be liable to a fine" of not more than \$5,000 nor less than \$500 to be recovered by indictment by the personal representative of the deceased for the use of the widow and children, or, if none, for the heirs.

Although almost identical in language with the Massachusetts statutes, it was held that the amount of the forfeiture should be assessed by the jury, and should be measured by the pecuniary loss sustained by those to whom the damages were given (*State v. Maine Central R.R. Co.*, 76 Me. 357, 369). The court said, in substance, that it was not part of the purpose of these statutes to punish the corporation as for a criminal offence (*State v. Maine Central R.R. Co.*, 60 Me. 492, 493), and that the proceeding, although criminal in form, was essentially civil in its nature, so that a nonsuit or *noelle prosequi* could be entered after trial was begun, although this could not be done in a criminal case (*State v. Maine Central R.R.*, 77 Me. 244).

In *State v. Grand Trunk R'y Co.*, 58 Me. 176, 180, the court held that the statute was undoubtedly made for the purpose of obviating the rule of the common law which prevented the recovery of damages for loss of life, and of enabling the heirs or family to recover for their own use damages to a limited extent. There was no necessity of proving criminal intent or malice; no punishment or sentence was inflicted; it has none of the distinguishing characteristics of a criminal prosecution, except the form of indictment. "We are satisfied that in all this class of cases, where the statute has attempted to supply the supposed defect of the common law . . . the same rules of evidence and the same principles of law should be applied, as in like cases, when redress is sought by a civil action for damages."

The acts of the deceased in assuming the risk may be a defence to the action.

These statutes remained in force until 1891, when an

action for damages was given to the personal representative of the deceased to recover

"a fair and just compensation not exceeding \$5000. with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, namely the widow and children, or if there are neither, the heirs.

St. (Maine) 1891, e. 124.

See also Rev. St. (Maine) (1903), e. 89, secs. 9 and 10, e. 54, sec. 14.

The death section of the employers' liability statute is evidently copied from the Massachusetts statutes.

"If damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable" (St. 1909, e. 258, sec. 4).

There have been no decisions under this recent statute, so far as we have discovered.

New Hampshire.

The statutes of the Province of New Hampshire in 1732 contained a highway death statute similar to that of Massachusetts.

In 1850 a law was passed applying to railroads and using the words

"shall be liable to a fine, not exceeding \$5000 nor less than \$500 to be recovered by indictment to the use of the executor or administrator."

It was for the benefit of widow and children, if any; if neither, for the heirs.

Laws of 1850, e. 953, sec. 7.

See also Comp. St. (1853), e. 150, sec. 66.

Gen. St. (1867), e. 264, sec. 14.

Gen. Laws (1878), e. 282, sec. 14.

of assessing damages for loss of life without regard to the degree of negligence which has occasioned that loss.

Such "right of action" is peculiarly a remedy created for the dependent family and not a method of punishment for homicide by negligence. The community is protected by its independent remedy under the criminal law of the state, by way of indictment against the person or persons through whose individual negligence such a homicide is caused. Sections 73 and 74 are, therefore, to be classed as "remedial" rather than "penal," as distinguished by this Court in *Huntington v. Attrill, supra*. They are not penal in the "international sense."

We respectfully submit that the now well-settled doctrine of the federal courts in Massachusetts (pp. 36 and 37, *ante*), that their jurisdiction may be invoked in actions brought under this and similar statutes, should be sanctioned and the judgment of the Circuit Court affirmed.

ASA P. FRENCH,
JAMES S. ALLEN, JR.,

For defendant in error.